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[redacted] of the United States

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 205

J. W. FREE, PETITIONER,

vs.

JAMES F. BLAND.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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[fol. 4]

IN THE
DISTRICT COURT OF UPSHUR COUNTY, TEXAS
115TH JUDICIAL DISTRICT

No. 12,109

J. W. FREE

vs.

JAMES F. BLAND, Individually
and as Independent Executor

PLAINTIFF'S ORIGINAL PETITION—Filed March 2, 1959

To Said Honorable Court:

Now comes J. W. Free, hereinafter styled plaintiff, complaining of James F. Bland, individually and as Independent Executor of the Estate of Ida Free, deceased, hereinafter styled defendant, and represents:

I.

That plaintiff is a resident of Upshur County, Texas, that the defendant resides in Hunt County, Texas, and is the duly appointed and qualified Independent Executor of the Estate of Ida Free, deceased, the administration upon which estate is now pending in the County Court of Upshur County, Texas.

II.

And for cause of action, plaintiff alleges that his wife, Ida Free, died testate in Upshur County, Texas, on April 23, 1958, and that he and Ida Free were lawfully married many years prior thereto, and lived together as husband and wife in Upshur County, Texas for many years prior thereto and up to the time of her death; that the said Ida Free left a written will, duly probated in Upshur County,

Texas, in which she named her only child, James F. Bland, defendant herein, as the Independent Executor of her es- [fol. 5] tate, and left to the said James F. Bland all of her property, except several cash gifts made to some of her brothers and a sister, all of which have heretofore been paid by the Executor.

III.

That during his marriage with Ida Free, the said J. W. Free purchased various and sundry United States Government Bonds, among which were the following bonds set out below. These bonds were purchased between the months of May, 1941 and November, 1945, eleven of said bonds being in the principal sum of $1,000 each, one bond being in the sum of $5,000, seven of said bonds being in the sum of $10,000 each. The numbers of each of said bonds, the amounts thereof, the date the same was purchased, and the payees in said bonds are as follows:

Number	*Date of Purchase*	*Amount*	*Payable to:*
M4744268E	May, 1941	$1,000.00	Mrs. Mary Ida Free or John W. Free
M4744269E	Nov., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744270E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744271E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744272E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M5693827E	Feb., 1944	1,000.00	John W. Free or Mrs. Mary Ida Free
M5693828E	Feb., 1944	1,000.00	John W. Free or Mary Ida Free
M998211F	May, 1945	1,000.00	John W. Free or Mrs. Ida Free

Number	*Date of Purchase*	*Amount*	*Payable to:*
M1000566F	Nov., 1945	1,000.00	J. W. Free or Mrs. Ida Free
M1000567F	Nov., 1945	1,000.00	J. W. Free or Mrs. Ida Free
M998212F	May, 1945	1,000.00	John W. Free or Mrs. Ida Free
V214788F	Dec., 1944	5,000.00	John W. Free or Mrs. Ida Free
X149353F	June, 1944	10,000.00	John W. Free or Mrs. Ida Free
X149372F	June, 1944	10,000.00	John W. Free or Mrs. Ida Free
[fol. 6]			
X188315F	May, 1945	10,000.00	John W. Free or Mrs. Ida Free
X188313F	May, 1945	10,000.00	John W. Free or Mrs. Ida Free
X188357F	May, 1945	10,000.00	J. W. Free or Mrs. Ida Free
X188581F	Mov., 1945	10,000.00	J. W. Free or Mrs. Ida Free

All of said bonds with the capital E after the number are "E" bonds, and all of said bonds with a capital F after the number are "F" bonds, and all bonds with a capital M preceding the figures are $1000 bonds, the one with a capital V preceding the figure is a $5,000 bond, and those with a capital X preceding the figure are $10,000 bonds. Copies of said bonds are hereto attached and made a part hereof for all purposes.

IV.

All of the above bonds were purchased by the said J. W. Free with community funds of himself and his deceased wife, Ida Free, and plaintiff alleges that at the death of Ida Free, this plaintiff became vested with the full ownership of the above described bonds, and although the same were purchased with community funds, no portion of said bonds vested in the defendant by the terms of the will of Ida Free, deceased, and defendant does not now own any right, title or interest in or to said bonds, although he claims to own an undivided one-half interest therein.

V.

All of said bonds are located and situated in Upshur County, Texas.

Wherefore, premises considered, plaintiff prays that the defendant be cited to appear and answer herein, and that on a trial hereof, he have judgment against the defendant, individually and as Independent Executrix of the Estate of [fol. 7] Ida Free, deceased, for the title to and possession of the United States Government Bonds above described, together with all accrued interest thereon, and that this court further enter its judgment declaring that plaintiff is the sole owner of said bonds and that the defendant has no right, title or interest therein, and for costs of suit, and such other relief to which plaintiff may be justly entitled.

Fulton, Hancock & McClain, Box 500, Gilmer, Texas; Edwin M. Fulton, Box 500, Gilmer, Texas, Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 27]

IN THE 115TH JUDICIAL DISTRICT COURT OF
UPSHUR COUNTY, TEXAS

No. 12,109

[Title omitted]

DEFENDANT'S ORIGINAL ANSWER—Filed July 13, 1959

Now comes James F. Bland, individually and as independent executor of the estate of Ida Free, deceased, defendant in the above entitled and numbered cause, and files this his original answer to plaintiff's original petition heretofore filed herein on the 2nd day of March, 1959, and for such answer says:

I.

Defendant denies generally each and every material allegation in plaintiff's original petition contained.

Wherefore, Premises Considered, defendant prays that all relief sought by plaintiff herein be by the court denied, and that he recover his costs herein.

Olin P. McWhirter, Greenville, Texas; Florence, Garrison & Holt, Gilmer, Texas; By G. L. Florence, Attorneys for Defendant.

[File endorsement omitted]

[fol. 28]

IN THE DISTRICT COURT OF UPSHUR COUNTY, TEXAS
115TH JUDICIAL DISTRICT

[Title omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed July 31, 1959

To Said Honorable Court:

Now comes J. W. Free, Plaintiff in the above styled and numbered cause, and moves the Court, pursuant to

Rule 166A, of the Texas Rules of Civil Procedure, to enter a Summary Judgment in Plaintiff's favor, for all the relief demanded in Plaintiff's Petition.

In this connection, Plaintiff would show that Defendant has failed to submit any affirmative defense and that the defense of general denial submitted by the Defendant is insufficient as a matter of law, and raises no issue to Plaintiff's cause of action; that there is no genuine issue as to any material fact, and Plaintiff is entitled to a judgment, as a matter of law.

This Motion is based upon the pleadings of the Plaintiff, on the affidavit of Edwin M. Fulton hereto attached, and the agreement attached to said affidavit, as well as the certified copies attached thereto.

Wherefore, premises considered, Plaintiff prays that judgment be entered as prayed for in his Petition.

Fulton, Hancock & McClain, Box 500, Gilmer, Texas; Edwin M. Fulton, Box 500, Gilmer, Texas, Attorneys for Plaintiff.

[fol. 29]

IN THE DISTRICT COURT, UPSHUR COUNTY

ORDER SETTLING CASE FOR HEARING—July 31, 1959

At the request of the Plaintiff, the Court has set Plaintiff's Motion for Summary Judgment for trial at Gilmer, Texas, at 10:00 A.M., on the 15 day of August, A. D. 1959, and Plaintiff is directed to give Defendant notice thereof, under the provisions of Rule 166A of the Rule of Civil Procedure of the State of Texas. This 31 day of July, 1959.

Looney E. Lindsey, Judge, 115th District Court, Upshur County, Texas.

Certificate of Service (omitted in printing).

[fol. 30]

IN THE DISTRICT COURT OF UPSHUR COUNTY, TEXAS

115TH JUDICIAL DISTRICT

[Title omitted]

AFFIDAVIT OF EDWIN M. FULTON IN SUPPORT OF MOTION

In support of the Motion of Plaintiff, J. W. Free, for Summary Judgment against the Defendant, James F. Bland, individually and as Independent Executor, in the above styled and numbered cause, Edwin M. Fulton, the undersigned, makes this affidavit, and thereby on oath states the following:

My name is Edwin M. Fulton. I reside in Gilmer, Upshur County, Texas. I am over twenty-one years of age, and am of sound mind and have never been convicted of any crime or offense, and have personal knowledge of every statement herein made.

I am an attorney of record for J. W. Free, Plaintiff in the above styled and numbered cause. I prepared the Original Petition and filed this cause on behalf of my client, J. W. Free. I am cognizant of all the facts stated in said Petition, and know that each and every allegation made therein is true.

Attached to said Petition are copies of nineteen bonds, issued by the United States Government, and payable jointly to J. W. Free and Ida Free, or John W. Free and Mary Ida Free. The originals of said bonds are in the possession of Alvin Spencer, Cashier of Farmers & Merchants National Bank, at Gilmer, Texas, and said bonds are deposited in the vault of said bank and the original bonds will be exhibited to the Court on the trial of Plaintiff's Motion for Summary Judgment. The copies of said bonds attached to Plaintiff's Original Petition are true and correct copies of the originals, and were made under the direction of affiant, in the office of affiant immediately prior to the time the Original Petition was filed in this case.

[fol. 31] Attached hereto is a contract, duly entered into by and between Olin P. McWhirter, as attorney for James

F. Bland, and Edwin M. Fulton, as attorney for J. W. Free, dated May 26, 1958, by the terms of which, it was agreed that the originals of the bonds, copies of which are attached to Plaintiff's Original Petition, would be delivered to Alvin Spencer, Cashier as aforesaid, who should hold the same in escrow until a final judgment was rendered adjudicating the title and ownership thereof. As stated, the contract is hereto attached, and the signature of Olin P. McWhirter thereon is his true signature, and the signature of Alvin Spencer is his genuine signature. Affiant signed said instrument with the said McWhirter and Spencer.

I have known J. W. Free and his wife, Ida Free, since the year 1931. At the time I first knew them, they were married and they continued to live together as husband and wife until the death of Mrs. Ida Free, on April 23, 1958. Attached hereto is a certified copy of her death certificate.

Mrs. Ida Free left a written will, and attached hereto is a certified copy of that will. By the terms of that will, she appointed her son, James F. Bland, as Independent Executor. The will was duly probated in the County Court of Upshur County, Texas, and attached hereto is a certified copy of the order of the County Court, probating said will and appointing James F. Bland as Independent Executor of said estate. After the appointment, the said James F. Bland qualified by taking the oath of office, and a certified copy of his oath of office is attached hereto. On May 12, 1958, letters testamentary were issued to the said James F. Bland, and a thermo-fax copy of the original is hereto attached and made a part hereof.

Witness My Hand this 30th day of July, A.D. 1959.

Edwin M. Fulton

Subscribed and Sworn to this 30th day of July, A.D. 1959.

[fol. 32] (Seal)

Shirley Osborne, Notary Public, Upshur County, Texas.

[fol. 33]

EXHIBIT TO AFFIDAVIT

THE STATE OF TEXAS)
COUNTY OF UPSHUR)

It is agreed by and between J. W. Free and James F. Bland, by and through their respective attorneys, that said J. W. Free and wife, Ida Free, prior to their death owned the following United States Bonds payable jointly to J. W. Free and Ida Free, or John W. Free and Mary Ida Free, to-wit:

Number	*Amount*	*Value*
M4744268E	$ 1,000.00	$ 1,175.00
M4744269E	1,000.00	1,162.50
M4744270E	1,000.00	1,150.00
M4744271E	1,000.00	1,150.00
M4744272E	1,000.00	1,150.00
M5693827E	1,000.00	1,124.00
M5693828E	1,000.00	1,124.00
M998211F	1,000.00	1,000.00
M1000566F	1,000.00	1,000.00
M1000567F	1,000.00	1,000.00
M998212F	1,000.00	1,000.00
V214788F	5,000.00	5,000.00
X149353F	10,000.00	10,000.00
X149372F	10,000.00	10,000.00
X188077F	10,000.00	10,000.00
X188313F	10,000.00	10,000.00
X188315F	10,000.00	10,000.00
X188357F	10,000.00	10,000.00
X188581F	10,000.00	10,000.00

It is the position of J. W. Free that the title to these jointly payable bonds vested in him at the death of Mrs. Free, and that said bonds did not pass under the terms of Mrs. Free's will and form no part of her estate.

It is agreed that the above bonds will be and they are hereby being delivered to Alvin Spencer, Cashier of Farmers & Merchants National Bank of Gilmer, Texas,

who shall hold the bonds in escrow until the parties or their attorneys advise him to deliver said bonds to one or the other, or some third party, or until it is determined by a final judgment of a Court of competent jurisdiction that such bonds belong to J. W. Free, in which event he will deliver the same to the said Free. If the final judgment of a Court of competent jurisdiction determines that said bonds are jointly owned by the parties, then the bonds [fol. 34] will be divided equally and delivered to said parties.

DATED at Gilmer, Texas and executed in triplicate this 26th day of May, A.D. 1958.

Olin P. McWhirter
Attorney for James F. Bland

Edwin M. Fulton
Attorney for J. W. Free

I hereby acknowledge receipt of the above described bonds, and agree to hold them for the parties according to the terms of this contract.

Alvin Spencer, Cashier
Farmers & Merchants National Bank

[fol. 34a]

EXHIBIT TO AFFIDAVIT

(See opposite) ☞

Exhibit To Affidavit

STATE OF TEXAS

CERTIFICATE OF DEATH

STATE FILE NO.

TEXAS DEPARTMENT OF HEALTH — BUREAU OF VITAL STATISTICS

VS-112, REV. 1/58

1. PLACE OF DEATH
a. COUNTY: Upshur
b. CITY OR TOWN (If outside city limits, give precinct no.): Gilmer
c. LENGTH OF STAY in this place: 20
d. NAME OF (If not in hospital, give street address) HOSPITAL OR INSTITUTION:
e. IS PLACE OF DEATH INSIDE CITY LIMITS? YES [X] NO [ ]

2. USUAL RESIDENCE (Where deceased lived. If institution, residence before admission.)
a. STATE: Texas
b. COUNTY: Upshur
c. CITY OR TOWN (If outside city limits, give precinct no.): 304 N. Montgomery
d. STREET ADDRESS (If rural, give location):
e. IS RESIDENCE INSIDE CITY LIMITS? YES [X] NO [ ]
f. IS RESIDENCE ON A FARM? YES [ ] NO [X]

3. NAME OF DECEASED (Type or print): (a) First: MARY (b) Middle: IDA (c) Last: FREE
4. DATE OF DEATH: April 23, 1958
5. SEX: Female
6. COLOR OR RACE: White
7. Married [X] Never Married [ ] Widowed [ ] Divorced [ ]
8. DATE OF BIRTH: Sept. 18, 1876
9. AGE (In years last birthday): 81
If UNDER 1 YEAR: Months / Days. If UNDER 24 HRS.: Hours / Minutes
10a. USUAL OCCUPATION (Give kind of work done during most of working life, even if retired): Housewife
10b. KIND OF BUSINESS OR INDUSTRY: Housewife
11. BIRTHPLACE (State or foreign country): Smith County, Texas
12. CITIZEN OF WHAT COUNTRY? U.S.A.
13. FATHER'S NAME: S. E. SHELTON
14. MOTHER'S MAIDEN NAME: FANNIE TUTEL
15. WAS DECEASED EVER IN U.S. ARMED FORCES? (Yes, no, or unknown): No (If yes, give war or dates of service): None
16. SOCIAL SECURITY NO.: None
17. INFORMANT: J. W. FREE

MEDICAL CERTIFICATION

18. CAUSE OF DEATH [Enter only one cause per line for (a), (b), and (c).]
PART I. DEATH WAS CAUSED BY:
IMMEDIATE CAUSE (a): Cerebral Hemorrhage — INTERVAL BETWEEN ONSET AND DEATH: 5 days
Conditions, if any, which gave rise to above cause (a), stating the underlying cause last.
DUE TO (b):
DUE TO (c):
PART II. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO THE TERMINAL DISEASE CONDITION GIVEN IN PART I(a): No
19. WAS AUTOPSY PERFORMED? YES [ ] NO [X]
20a. ACCIDENT [ ] SUICIDE [ ] HOMICIDE [ ] No
20b. DESCRIBE HOW INJURY OCCURRED. (Enter nature of injury in Part I or Part II of Item 18.)
20c. TIME OF INJURY: Hour, a.m. p.m. / Month / Day / Year
20d. INJURY OCCURRED WHILE AT WORK? [ ] NOT WHILE AT WORK? [ ] No
20e. PLACE OF INJURY (e.g., in or about home, farm, factory, street, office building, etc.)
20f. CITY, TOWN, OR LOCATION / COUNTY / STATE
21. I hereby certify that I attended the deceased from 4-19 19 58 to 4-23- 19 58 and last saw the deceased alive on 19 . Death occurred at m. on the date stated above, and to the best of my knowledge, from the cause stated.
22a. SIGNATURE (Degree or title): J. W. FENLAW M.D.
22b. ADDRESS: GILMER, TEXAS
22c. DATE SIGNED: 4-26-58

23a. BURIAL, CREMATION, REMOVAL (Specify): Burial
23b. DATE: April 24, 1958
23c. NAME OF CEMETERY OR CREMATORY: East Mt. Cemetary
23d. LOCATION (City, town, or county) (State): Upshur County, Texas
24. FUNERAL DIRECTOR'S SIGNATURE: J.B. Hill Jr.
Crowley Funeral Home, Gilmer, Texas
25a. REGISTRAR'S FILE NO.: 1119
25b. DATE REC'D BY LOCAL REGISTRAR: 5-1-1958
25c. REGISTRAR'S SIGNATURE: L.E. Stracener Sr. J.P. No. 1

IF DECEASED SERVED IN U.S. ARMED FORCES, FILL OUT THE FOLLOWING:

Is the deceased reported to have been in such service?
Name of organization in which service was rendered?
Serial number of discharge papers or adjusted service certificate?
Name of next of kin or of next friend?
Post Office Address?

IF DECEASED WAS MARRIED, FILL OUT THE FOLLOWING:

Name of husband or wife	Age in years

IF DECEASED IS AN UNIDENTIFIED PERSON, FILL OUT THE FOLLOWING:

Color of Hair?	Color of Eyes?	Height? Ft. In.	Weight?
Deformities?		Tattoo Marks?	
Other marks of identification?			

THE STATE OF TEXAS I
COUNTY OF UPSHUR I

I, O. W. Loyd, County Clerk, Upshur County, Texas, hereby certify that the within and foregoing matter of writing constitutes a full, true and correct copy of original, as same appears filed for record in this office bearing file No. . . Vol. 12, page 2.

GIVEN under my hand and seal of office, at Gilmer, Texas, this the 30 day of July A.D. 1959.

O.W. LOYD, County Clerk
Upshur County, Texas.

By Ena Gordon Deputy.

(Seal).

[fol. 35]

EXHIBIT TO AFFIDAVIT

THE STATE OF TEXAS)
COUNTY OF PALO PINTO)

I, Ida Free, of the County of Upshur and the State of Texas, being of sound and disposing mind and memory, and being desirous to settle my worldly affairs while I have strength to do so, do make this my last will and testament, hereby revoking all others heretofore made.

1.

I desire and direct that my body be buried in a decent and Christianlike manner, suitable to my circumstances and condition in life.

2.

I desire and direct that my just debts be paid out of my estate without delay, by my executor, to be hereinafter appointed.

3.

I hereby give and bequeath to my sisters, Lizzie Pettis and Beulah Esterman, and my sister-in-law, Mrs. Vinnie Shelton, all of my clothing, to be equally divided among them, share and share alike.

4.

I hereby give and bequeath to my granddaughter, Jimmie Goerge Bland, all of my jewelry.

5.

I hereby give and bequeath to my sister, Lizzie Pettis, of Gilmer, Texas, the sum of Five Thousand and no/100 Dollars ($5,000.00), to be paid out of my estate by my executor, hereinafter named, as soon after my decease as conveniently may be done, in the following manner, to-wit: said Five Thousand and no/100 Dollars ($5,000.00) to be placed in a bank nearest the residence of my sister, Lizzie [fol. 36] Pettis, with direction and instruction that the

same be withdrawn at the rate of Fifty and no/100 Dollars ($50.00) per month and no more, during her natural life, and upon her death, then the remainder, if any, of said Five Thousand and no/100 Dollars ($5,000.00) to go to her children in equal parts, share and share alike.

6.

I hereby give and bequeath to my sister, Beulah Westerman, of Alice Texas, the sum of Five Thousand and no/100 Dollars ($5,000.00) to be paid out of my estate by my executor, hereinafter named, as soon after my decease as conveniently may be done, in the following manner, to-wit: said Five Thousand and no/100 Dollars ($5,000.00) to be placed in a bank nearest the residence of my sister, Beulah Westerman, with direction and instruction that the same be withdrawn at the rate of Fifty and no/100 Dollars ($50.00) per month and no more, during her natural life, and upon her death, then the remainder, if any, of said Five Thousand and no/100 Dollars ($5,000.00) to go to her children in equal parts, share and share alike.

7.

I hereby give and bequeath to my brother, A. L. Shelton, of Gilmer, Texas, the sum of Five Thousand and no/100 Dollars ($5,000.00), to be paid out of my estate by my executor, hereinafter named, as soon after my decease as conveniently may be done, in the following manner, to-wit: said Five Thousand and no/100 Dollars ($5,000.00) to be placed in a bank nearest the residence of my brother, A. L. Shelton with direction and instruction that the same be [fol. 37] withdrawn at rate of Fifty and no/100 Dollars ($50.00) per month and no more, during his natural life, and upon his death, then the remainder, if any, of said Five Thousand and no/100 Dollars ($5,000.00) to go to his children in equal parts, share and share alike.

8.

After the payment of all my just debts and the foregoing legacies, I give and bequeath all the residue of my estate,

both real and personal property including my household and kitchen furniture that I may die seized and possessed of, to my beloved son, James F. Bland, Greenville, Texas, in fee simple, to manage, sell, or dispose of as he may wish or see proper. It is also my wish that if there by any of the household and kitchen furniture that my said beloved son, James F. Bland, does not want, then and in that event. I request that he divide same with my two sisters and brother, to-wit: Lizzie Pettis, Beulah Westerman, and A. L. Shelton, share and share alike.

9.

In order that there may be no misunderstanding, I hereby state that all the property that I now own is the community interest that I have with my beloved husband, J. W. Free, as I have heretofore given to my beloved son, James F. Bland, Sixty Two and one half acres (62 and ½) of land out of the G. W. Hooper Survey in Upshur County, Texas, same being known as the J. W. F. Bland home place, and said property is now and has been for a number of years the property of the said James F. Bland.

10.

I hereby constitute and appoint my beloved son, James F. Bland, of Greenville, Texas, should he survive me, as [fol. 38] sole and independent executor of this, my last will and testament, and direct that no bond or security be required of him as executor. It is my further wish that my beloved son advise and consult, with my brother-in-law, Guy Westerman, in matters pertaining to my said estate. In the event that my beloved son, James F. Bland, not survives me, then and in that event, I hereby nominate and appoint my beloved brother-in-law, Guy Westerman, of Alice, Texas, executor of this, my last will and testament, and direct that no bond or security be required of him as executor.

11.

It is my will that no other action shall be had in the County Court in the administration of my estate than to

prove and record this will and return an inventory and appraisement of my estate and list of claims.

IN TESTIMONY WHEREOF I have hereto set my hand in Mineral Wells, Texas, this the 24th day of September A.D. 1940 in the presence of the two witnesses who attest same at my request.

Ida Free

The above instrument was signed, declared, and published by Ida Free, as her last will and testament, in our presence, and we, at her request and in her presence and in the presence of each other, sign out names hereto as attesting witnesses, this the 24th day of September A.D. 1940 at Mineral Wells, Texas.

Lillian Muhurin
Olin P. McWhirter

ENDORSED: No. 2704 WILL OF IDA FREE FILED 4-29-58
R. C. VIVIAN CLERK UPSHUR COUNTY

[fol. 39]

THE STATE OF TEXAS)
COUNTY OF UPSHUR)

I, O. W. Loyd, County Clerk, Upshur County, Texas, hereby certify that the within and foregoing matter of writing constitutes a full, true and correct copy of original, as same appears filed for record in this office bearing file No. 2704, Vol. 37 page 432.

GIVEN under my hand and seal of office, at Gilmer, Texas, this the 30 day of July A.D. 1959.

O. W. LOYD, County Clerk
Upshur County, Texas

By Exa Gordon Deputy.

(Seal).

[fol. 40]

EXHIBIT TO AFFIDAVIT

No. 2704

ESTATE OF
IDA FREE,
DECEASED

On this, the 12th day of May, A.D. 1958 came on to be heard the application of James F. Bland for the probate of the last will and testament of Ida Free, deceased, now produced in Court, and the evidence, a statement of which is filed in this case, being fully considered by the Court, and it appearing to the Court that the said Ida Free is deceased; that citation thereof has been duly made as required by law, to which no objection has been made; that the Court has jurisdiction and venue over said estate; that the said James F. Bland is named and appointed in said will Executor thereof without bond and that he is not disqualified therefor, and that four years have not elapsed since the death of the deceased.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the last will and testament of the said Ida Free, deceased, is hereby admitted to probate and record and the testimony shall be recorded in the minutes of this Court. IT IS FURTHER ORDERED BY THE COURT that Letters Testamentary there of be granted to the said James F. Bland without bond, he having first taken the required oath and that no other action shall be had in this suit in the administration of said estate than to return into this Court an inventory, appraisement and a list of claims of said estate.

And it further appearing to the Court that Bruce Morris, H. A. Wheeler, and Ralph Byman are citizens of Upshur County, Texas, and disinterested persons in said estate, it is therefore ordered that they or any two of them may act, and they are hereby appointed to appraise the estate, both real and personal of Ida Free, deceased.

J. W. Bryce
County Judge Upshur County, Texas.

[fol. 41]

ENDORSED: No. 2704
ORDER PROBATING WILL AND APPOINTING APPRAISERS FILED MAY 12, 1958, R.C. VIVIAN CLERK UPSHUR COUNTY

THE STATE OF TEXAS)
COUNTY OF UPSHUR)

I, O. W. Loyd, County Clerk, Upshur County, Texas, hereby certify that the within and foregoing matter of writing constitutes a full, true and correct copy of original, as same appears filed for record in this office bearing file No. 2704 Vol. 37, page 438.

GIVEN under my hand and seal of office, at Gilmer, Texas, this the 30 day of July A.D. 1959.

O. W. Loyd, County Clerk,
Upshur County, Texas

By Exa Gordon Deputy

[fol. 42]

OATH OF EXECUTOR

I do solemnly swear that the writing which has been offered for Probate is the last Will of Ida Free so far as I know or believe and that I will well and truly perform all the duties of executor of said Will of the Estate of Ida Free, deceased.

James F. Bland

Sworn to and subscribed before me this 12th day of May 1958.

Olin P. McWhirter
Notary Public, Hunt County, Texas

(SEAL).

ENDORSED: No. 2704 ESTATE OF IDA FREE DECEASED OATH OF EXECUTOR FILED MAY 12, 1958 R.C. VIVIAN CLERK UPSHUR COUNTY

THE STATE OF TEXAS)
COUNTY OF UPSHUR)

I, O. W. Loyd, County Clerk, Upshur County, Texas, hereby certify that the within and foregoing matter of

writing constitutes a full true and correct copy of original as same appears filed for record in this office bearing file No. 2704 Vol. 37 Page 440.

GIVEN under my hand and seal of office, at Gilmer, Texas, this the 30 day of July A.D. 1959.

O.W. LOYD, County Clerk
Upshur County, Texas.

By Exa Gordon Deputy.

(Seal).

[fol. 43] [File endorsement omitted]

LETTERS TESTAMENTARY

THE STATE OF TEXAS)
COUNTY OF UPSHUR)

IN COUNTY COURT
UPSHUR COUNTY, TEXAS

I, R. C. Vivian Clerk of the County Court of Upshur County, Texas, do hereby certify that on the 12th day of May A.D. 1958, James F. Bland was duly granted by said Court Letters Testamentary of the Estate of Ida Free deceased and that he qualified as such Executor of said Estate on the 12th day of May A.D. 1958 as the law requires, and that said appointment is still in full force and effect.

Witness my hand and seal of office at Gilmer, Texas, this 12th day of May A.D. 1958.

R.C. VIVIAN, CLERK
COUNTY COURT UPSHUR COUNTY, TEXAS.

BY Edrie King Deputy.

(Seal).

[fol. 44]

IN THE 115TH JUDICIAL DISTRICT COURT OF
UPSHUR COUNTY, TEXAS

[Title omitted]

ANSWER AND CROSS ACTION—Filed August 28, 1959

To the Honorable Looney E. Lindsey, Judge of Said Court:

Now comes James F. Bland, individually and as Independent Executor of the Estate and under the Will of Ida Free, deceased, defendant in the above entitled and numbered cause, and files this his first amended original answer to plaintiff's original petition heretofore filed herein on the 2nd day of March, 1959, and for such answer says:

I.

Defendant admits that he is the duly appointed and qualified independent executor of the estate of Ida Free, deceased, the administration upon which estate is now pending in the County Court of Upshur County, Texas.

II.

Defendant also admits that plaintiff, J. W. Free, and Ida Free, deceased, were lawfully married to each other many years prior to the filing of this suit, to-wit: on January 7, 1899, and lived together as husband and wife until the date of the death of the said Ida Free, which occurred on April 23, 1958.

III.

Defendant also admits that the said Ida Free left a written will, which has been duly probated by an order and judgment of the County Court of Upshur County, Texas, in which she named her only child, James F. Bland, defendant herein, as Executor of her estate and left to the said James F. Bland, by the terms and provisions of said will, all of her property, except certain cash gifts made to some of her brothers and a sister, all of which

cash gifts have heretofore been paid by the Executor, defendant herein.

[fol. 45] IV.

Defendant also admits that during the marriage relation between J. W. Free and Ida Free, the said J. W. Free purchased various and sundry U.S. Government bonds, described and identified in Paragraph 3 of plaintiff's original petition, which paragraph is here referred to and made a part hereof as fully and to the same extent as if fully copied herein.

V.

Defendant also admits that all of said bonds mentioned and referred to in said paragraph of plaintiff's original petition, were and are "E" bonds, except those with a capital "F" after the number are "F" Bonds, and all bonds with a capital "M" preceding the figure are $1,000.00 bonds, and the one with a capital "V" preceding the figure is a $5,000.00 bond, and those with a capital "X" preceding the figures are $10,000.00 bonds, a copy of said bonds being attached to plaintiff's original petition, which copies are here referred to and made a part hereof for all purposes.

VI.

Defendant also admits, as alleged in plaintiff's petition, in paragraph 4 thereof, that "all of the above bonds were purchased by the said J. W. Free with community funds of himself and his deceased wife, Ida Free."

VII.

Further and specially answering herein, this defendant says that none of the bonds above mentioned and referred to had been cashed at the time and on the date of the death of the said Ida Free, nor has any of said bonds been cashed since her death, but same are still in the possession and under the control of the plaintiff, J. W. Free.

VIII.

Further and specially pleading herein, this defendant says that all of said bonds sued upon by plaintiff herein,

having been acquired during the marriage relation of plain-
[fol. 46] tiff and his wife, Ida Free, during their marriage relation to each other, as a result of their joint labors, constituted community property between the plaintiff and the said Ida Free, and were a part of the community estate of the said J. W. Free and Ida Free at the date of the death of the said Ida Free, and that by virtue thereof, and under and by virtue of the terms and provisions of the will of the said Ida Free, this defendant became the owner of the community interest owned by Ida Free in said bonds at the date of her death.

IX.

Further and specially pleading herein, and in the alternative, this defendant says that should he be mistaken in the allegations contained in the preceding paragraph of this answer, as to his being the owner of one-half (½) of said bonds, or one-half (½) interest therein, then he says that inasmuch as said bonds were paid for out of community funds of the said J. W. Free and Ida Free, and the community estate was depleted by reason of the purchase of said bonds by the said J. W. Free, without the knowledge or consent of his wife, Ida Free, that he by reason thereof, and being the sole beneficiary under the will and of the estate of Ida Free, is entitled to be reimbursed to the extent of one-half (½) of the community funds used by the plaintiff, J. W. Free, in the purchase of said bonds, and that a lien should be created against the interest of J. W. Free in said bonds, or in the alternative, against the estate of J. W. Free, to secure the payment to him of one-half (½) of the community funds expended by J. W. Free in the purchase of said bonds.

Premises Considered, this defendant prays that the relief sought by plaintiff herein be denied, or in the alternative, he prays that he be decreed by decree of this court to be entitled to one-half (½) interest in said bonds, or in the alternative, a one-half (½) interest in the amount of said bonds, and that a lien be created against said bonds, or in the alternative, against the estate of the said J. W.
[fol. 47] Free, to secure the payment of the value of one-

half (½) interest in the proceeds of said bonds, and for such other and further relief, general or special, to which defendant may be entitled, either at law or in equity, by reason of the facts hereinabove alleged.

Olin P. McWhirter, Greenville, Texas; Florence, Garrison & Holt, Gilmer, Texas, By G. L. Florence, Attorneys for Defendant.

CROSS ACTION

Now comes James F. Bland, individually and as Independent Executor under the will and of the estate of Ida Free, deceased, and files this cross action against J. W. Free, in which he will hereinafter be called Cross Plaintiff, and J. W. Free will hereinafter be called Cross Defendant, and would with respect show to the court the following:

I.

That Cross Plaintiff resides in Greenville, Hunt County, Texas, and Cross Defendant, J. W. Free resides in Upshur County, Texas, but is at this time and has been for a considerable period of time prior hereto, temporarily confined in a hospital at Gladewater, Gregg County, Texas.

II.

Cross Plaintiff further represents to the court that J. W. Free, the original plaintiff in this case, and Ida Free, deceased, were married to each other on or about January 7, 1899, and lived together as husband and wife until the date of the death of the said Ida Free, on April 23, 1958; that no child was born to J. W. Free and Ida Free as a result of their marriage to each other; that no child was adopted by either of said parties; that Ida Free had been [fol. 48] married prior to her marriage to J. W. Free, to one ———— Bland, and as a result of the marriage of the said Ida Bland and ———— Bland, only one child was born, to-wit: James F. Bland, Cross-Plaintiff herein.

III.

Further and specially pleading herein, Cross Plaintiff shows to the court that Ida Free died testate in Upshur

County, Texas, about April 23, 1958; that the said Ida Free left a written will executed under the forms and solemnities required by law to constitute same a valid, legal will, a copy of which will is hereto attached, marked Exhibit "A" * and made a part hereof for all purposes as fully and to the same extent as if fully copied herein. That said will so made by the said Ida Free has been duly and legally admitted to probate and record by the Probate Court of Upshur County, Texas, as the last will and testament of the said Ida Free, a copy of which judgment admitted said will to probate and record is attached hereto, marked Exhibit "B" ** for identification and made a part hereof for all purposes as fully and to the same extent as if fully copied herein.

IV.

That Cross Plaintiff has duly and legally qualified as independent executor under the will and of the estate of Ida Free, as required by law, has taken the oath, as provided by law, but has made no bond, inasmuch as the will of the said Ida Free provided that he not be required to make bond, and by reason of the foregoing, he is interested in the estate, property, claims and equities of Ida Free, deceased.

V.

Further and specially pleading herein, Cross Plaintiff says that during the marriage of J. W. Free and Ida Free, the said J. W. Free, without the knowledge or consent of Ida Free, his wife, purchased various and sundry U.S. Government bonds, among which were the following bonds, [fol. 49] set out below; that said bonds, listed below, were purchased between the months of May, 1941 and November 1945, eleven (11) of said bonds being in the principal sum of $1,000.00 each, one bond in the sum of $5,000.00, seven (7) bonds being in the sum of $10,000.00 each, the numbers of said bonds, the amounts thereof, the dates same

* Clerk's Note—Said will appears as an Exhibit at side folio 35, printed page 11.

** Clerk's Note—Said judgment appears as an Exhibit at side folio 40, printed page 16.

were purchased and the payee in said bonds being as follows:

Number	*Date of Purchase*	*Amount*	*Payable to:*
M4744268E	May, 1941	$ 1,000.00	Mrs. Mary Ida Free or John W. Free
M4744269E	Nov., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744270E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744271E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744272E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M5693827E	Feb., 1944	1,000.00	John W. Free or Mrs. Mary Ida Free
M5693828E	Feb., 1944	1,000.00	John W. Free or Mrs. Mary Ida Free
M998211F	May, 1945	1,000.00	John W. Free or Mrs. Mary Ida Free
M1000566F	Nov., 1945	1,000.00	J. W. Free or Mrs. Ida Free
M1000567F	Nov., 1945	1,000.00	J. W. Free or Mrs. Ida Free
M998212F	May, 1945	1,000.00	John W. Free or Mrs. Ida Free
V214788F	Dec., 1944	5,000.00	John W. Free or Mrs. Ida Free
X149353F	June, 1944	10,000.00	John W. Free or Mrs. Ida Free
X149372F	June, 1944	10,000.00	John W. Free or Mrs. Ida Free
X188077F	Nov., 1944	10,000.00	John W. Free or Mrs. Ida Free
X188315F	May, 1945	10,000.00	John W. Free or Mrs. Ida Free
X188313F	May, 1945	10,000.00	John W. Free or Mrs. Ida Free
X188357F	May, 1945	10,000.00	J. W. Free or Mrs. Ida Free
X188581F	Nov., 1945	10,000.00	J. W. Free or Mrs. Ida Free

All of said bonds with the capital "E" after the number are "E" bonds, and all of said bonds with a capital "F" after the number are "F" bonds, and all bonds with a capital "M" preceding the figures are $1,000.00 bonds, the one [fol. 50] with a capital "V" preceding the figure is a $5,000.00 bond, and those with a capital "X" preceding the figure are $10,000.00 bonds. Copies of said bonds are hereto attached and made a part hereof for all purposes.

VI.

Further and specially pleading herein, Cross Plaintiff says that each of the bonds mentioned above, was purchased by J. W. Free with community funds earned by J. W. Free and Ida Free as a result of their joint labors during their marriage to each other; that by reason of the purchase of said bonds by the said J. W. Free with community funds belonging to J. W. Free and Ida Free, the said bonds became as between Cross Plaintiff and Cross Defendant, community assets of the said J. W. Free and his deceased wife, Ida Free, and this Cross Plaintiff should be decreed to be the owner of a one-half interest in said bonds, including principal thereof and interest thereon to this date.

VII.

Pleading in the alternative, Cross Plaintiff says that should he be mistaken in his allegations that he is the owner of a one-half interest in said bonds, together with interest thereon, then he says that said bonds, having been purchased by the said J. W. Free without the knowledge or consent of his then wife, Ida Free, with community funds, same having been acquired by J. W. Free and Ida Free during the time they lived together as husband and wife, and as a result of their joint labors, depleted the community estate and funds of the said J. W. Free and Ida Free to the extent of the purchase price of said bonds, and that by reason thereof, and the facts hereinabove alleged, the community estate of the said J. W. Free and Ida Free should be reimbursed in the event J. W. Free

is decreed to be the owner of said bonds, to the extent of one-half (½) of the community funds used by the said J. W. Free in the purchase of said bonds, and a lien should be created against said bonds to secure the payment to [fol. 51] Cross Plaintiff herein of one-half (½) of the total value of said bonds, together with interest thereon, as is provided in said bonds, to this date, or in the alternative, that a lien be created against the property and estate of the said J. W. Free to secure the payment to Cross Plaintiff herein of one-half (½) of the total amount of said bonds, together with interest thereon at this date.

Wherefore, Premises considered, Cross Plaintiff prays that J. W. Free, Cross Defendant herein, be cited to appear and answer this cross action, and upon a final trial hereof, Cross Plaintiff be decreed to be the owner of a one-half (½) interest in said bonds; or, in the alternative, that he recover judgment against Cross Defendant, J. W. Free, for one-half (½) the alue of said bonds to the date of said trial, with interest thereon, as is provided for in said bonds, and that a lien be created against J. W. Free's interest in said bonds to secure the payment of said amount, viz., one-half (½) of the total value of said bonds as of the date of the trial.

In the alternative, he prays that if J. W. Free should be decreed by judgment of this court to be the owner of said bonds, that then, and in that event, he recover of and from J. W. Free, Cross Defendant herein, a one-half (½) interest in said bonds, or a sum equal to one-half (½) of the value of said bonds, together with interest thereon to the date of trial, by reason of the fact that same were purchased with community funds by J. W. Free, and that a lien be created against the estate of J. W. Free to secure the payment to Cross Plaintiff of one-half (½) the value of said bonds, together with interest thereon to the date of trial hereo, (sic) and for such other and further relief, general or special either at law or in equity, to which Cross Plaintiff may be entitled by virtue of the facts hereinabove alleged.

[fol. 52] Olin P. McWhirter, Greenville, Texas; Florence, Garrison & Holt, Gilmer, Texas, by G. L. Florence, Attorneys for Cross Plaintiff.

[fol. 60]

[File endorsement omitted]

IN THE DISTRICT COURT OF UPSHUR COUNTY, TEXAS

115TH JUDICIAL DISTRICT

[Title omitted]

ANSWER OF CROSS DEFENDANT, J. W. FREE—
Filed September 11, 1959

To Said Honorable Court:

Now comes J. W. Free, Cross Defendant in the Cross Action instituted against him by the Defendant, as Cross Plaintiff, and files this his Original Answer to Cross Plaintiff's Original Petition in Cross Action, and alleges:

I.

Cross Defendant excepts to all of Section VII of said petition and says the allegations therein contained do not allege a cause of action, and of this special exception, Cross Defendant prays judgment of the Court.

II.

Cross Defendant denies all the allegations in said Petition, except those that may have been alleged in his Original Petition as Plaintiff in this cause.

Wherefore, premises considered, Cross Defendant prays that Cross Plaintiff take nothing, and that he recover his costs.

Fulton, Hancock & McClain, Box 500, Gilmer, Texas;
Edwin M. Fulton, Box 500, Gilmer, Texas.

[fol. 61]

IN THE DISTRICT COURT OF UPSHUR COUNTY, TEXAS

115TH JUDICIAL DISTRICT

No. 12,109

J. W. FREE

VS.

JAMES F. BLAND, Individually and as Independent Executor

JUDGMENT—November 23, 1959

On the 23rd day of October, A. D. 1959, came on for trial and hearing the Motion for Summary Judgment, heretofore filed herein by Plaintiff, J. W. Free, on July 31, 1959, and all parties appeared in person or by their attorneys and announced ready for trial on said Motion, and the Court, after hearing said Motion, finds that the same has been made in proper form and time, and that proper service thereon has been made, and that all parties are before the Court; and,

The Court, having considered the pleadings on file and the affidavits, finds that they show an absence of any genuine issue as to any material fact, and that judgment should be rendered for Plaintiff, J. W. Free, adjudging him to be the owner of the United States Government Bonds sued for herein; and,

It further appearing to the Court that said bonds were purchased by J. W. Free with the community funds of himself and his wife, Ida Free, now deceased, and were of the value of $87,035.50 at the death of Ida Free, and the Court finds that judgment should be rendered for James F. Bland, as Independent Executor of the Estate of Ida Free, and as sole legatee and devisee under the will of Ida Free, deceased, against the said J. W. Free for the sum of $43,517.75, being one-half of the value of said United States Government Bonds at the death of Ida

Free, and that a lien should be fixed and foreclosed against the proceeds thereof to secure the payment of such sum;

[fol. 62] It is, therefore, Ordered, Adjudged and Decreed by the Court, on this the 23rd day of November, A. D. 1959, that the Plaintiff, J. W. Free, do have and recover of and from the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, judgment for the title to and possession of the United States Government Bonds, more particularly described in Plaintiff's Original Petition, and in Plaintiff's Motion for Summary Judgment; and,

It is Further Ordered, Adjudged and Decreed that the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, do have and recover of and from J. W. Free, the sum of $43,517.75, one-half of the value of said United States Government Bonds at the death of Ida Free, and a lien on said one-half of said proceeds is here fixed to secure the payment of this judgment and such lien is hereby foreclosed and Plaintiff and Defendant may have such writs and other processes as are necessary or advisable to enforce this judgment.

The costs herein are taxed against Plaintiff and execution shall issue for the collection thereof.

Plaintiff, J. W. Free, in open Court, duly excepted to said judgment and gave notice of appeal to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana.

Looney E. Lindsey, Judge Presiding.

[File endorsement omitted]

Cost Bond on Appeal for $1000 (omitted in printing).

[fol. 67]

DISTRICT COURT

UPSHUR COUNTY, TEXAS

BILL OF COST

No. 12,109

J. W. FREE, Plaintiff,

vs.

JAMES F. BLAND, Ind. & as Ind. Exr., Defendant.

115TH DISTRICT COURT

E. M. Fulton, Attorney for Plaintiff.

Florence, Garrison & Holt, Attorneys for Defendant.

To Officers of Court, Dr.

To District Clerk's Fees	$ 9.45
To Sheriff's Fees	$ 3.70
To Transcript on appeal	$35.00
To Library Fee	$ 1.00
Total	$49.15

A True and Correct Account.

Attest: Edward Poole, Clerk District Court, Upshur County, Texas, By ....., Deputy.

Please Mail Check.

[fol. 68] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 70]

IN THE COURT OF CIVIL APPEALS OF TEXAS

Appeal from the District Court of Upshur County, Texas.

No. 7223

J. W. FREE, Appellant,

vs.

JAMES F. BLAND, Individually, and as Independent Executor, Appellee.

OPINION—July 12, 1960

Appellant, J. W. Free, sued appellee James F. Bland, individually and as independent executor of the estate of Mary Ida Free, for recovery of the title to and possession of certain United States Savings Bonds, together with accrued interest thereon, and for a judgment declaring that appellant was the sole owner of said bonds and that appellee had no rights therein.

Both parties are in agreement upon the essential facts of the case. J. W. Free and Mary Ida Free were husband and wife until her death on April 23, 1958. Among other United States Savings bonds purchased during this marriage, from the years 1941 through 1945, were the following co-owner bonds, payable to "Mrs. Mary Ida Free or Mr. John W. Free"; "Mr. John W. Free or Mrs. Mary Ida Free"; "John W. Free or Mrs. Ida Free"; "J. W. Free or Mrs. Ida Free"; and "Mr. John W. Free or Mrs. Ida Free", to-wit: seven "E" bonds of the par value of $1,000.00 each; four "F" bonds of the par value of $1,000.00 each; one "F" bond of the par value of $5,000.00; and seven "F" bonds of the par value of $10,000.00 each. Upon the death of Mary Ida Free, all the co-owner bonds listed above were uncashed, having an aggregate value of $87,035.50. Mary Ida Free's written will, duly probated in Upshur County, Texas, vested the bulk of her estate in her son, James F.

Bland, appointing him independent executor, for which he duly qualified.

In appellee's answer and cross action to appellant's suit, he claimed that, because the Frees used community funds to purchase the co-owner bonds listed above, he as the heir to the bulk of Mrs. Free's estate was entitled to one-half the bonds, or, as an alternative, to one-half their value. Appellant filed a motion for summary judgment, with supporting affidavits, to which the appellee filed no reply, nor controverting affidavits. Upon a hearing on appellant's motion, the trial court, on November 23, 1959, rendered judgment for the appellant for the title to and possession of said co-owner bonds, but at the same time ordered that appellee, in equity, ought to recover from appellant one-half of the value of the bonds, and fixed a lien on the proceeds thereof to enforce the judgment.

[fol. 71] J. W. Free has appealed. Appellant's first three points of error are based upon the contention that, since the purchase of the co-owner United States Savings Bonds constituted a contract which guarantees, among its other provisions, payment to either surviving co-owner of the bonds in the event of the death of the other, and, since there was no pleading or proof that purchase of the bonds was in fraud of the community property rights of Mary Ida Free, the trial court erred in rendering judgment against the appellant for one-half of the value of the bonds and fixing a lien thereon. In this connection it is appellant's prime position that under the record in this cause he is entitled to the rendition of a judgment in his favor for the full title and possession of the bonds in question and all the fruits thereof, free and clear of any and all claims and liens asserted by appellee.

The regulations of the United States Treasury Department which pertain here (Department Circular No. 530, as revised) provide that "If either co-owner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving co-owner will be recognized as the sole and absolute owner of the bond and payment or reissue, as though the bond were registered in his name alone, will be made only to such survivor * * * ."

A few courts in states other than Texas, notably the Louisiana Supreme Court in Slater v. Culpepper (222 La. 962, 64 S.W. (2) 234, 37 A.L.R. (2) 1216), have held this regulation to be merely a method of payment designed for the convenience of the government; also see the case of In the Matter of the Estate of Bertha Q. Allen, deceased, 343 P. (2) 867, Supreme Court of Washington, which follows the Slater v. Culpepper case, but which also recognizes that the Supreme Court of Texas reached the opposite conclusion in Ricks v. Smith, Tex., 318 S. W. (2) 439, and in the course of its opinion in said cause the Supreme Court of Washington stated:

> *"We are not unmindful of the fact that the Supreme Court of Texas, although badly divided, reached the opposite conclusion in Ricks* v. *Smith,* 318 S. W. 2d 439. However, we prefer and adopt the view of the Supreme Court of Louisiana in Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 237, 37 A. L. R. 2d 1216. * * * "

Appellee relies principally on the Slater v. Culpepper case, supra, the Allen estate case, supra, and the dissenting opinion of Justice Walker in Ricks v. Smith, supra.
[fol. 72] The Supreme Court of Texas in Ricks v. Smith, Tex., 318 S. W. (2) 439, divided 6 to 3, with Chief Justice Hickman writing the opinion for the majority. We quote from said majority opinion in part as follows:

> "It cannot be questioned that the opinion of the Court of Civil Appeals follows the rule adopted by a majority of the courts. A number of cases from other jurisdictions are cited in the annotation in 37 A.L.R. 2d 1216 et seq. The annotation is to the Louisiana case of Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 37 A.L.R. 2d 1216, which case declined to give controlling effect to the Treasury regulations incorporated in the bonds, holding that to do so would nullify community property law of that state. While that case is the only one cited from a State having community property law, we agree with the Court of Civil Appeals that the purchase of the bonds was by a contract which created a property right,—not merely a method of pay-

ment for the convenience of the Treasury Department. There is no sanctity of the community property law above that of other types of law. To give supremacy to Federal regulations no more affects community property law than laws of descent and distribution. The solution as to the property rights of the surviving co-owner of "or" bonds rests in contract, and that contract becomes a part of the bonds. The decisions in this jurisdiction cited in the opinion of the Court of Civil Appeals, while not deciding the precise question here presented, are certainly in harmony with the majority rule followed by that court. We, therefore, approve that holding."

The Court of Civil Appeals' opinion in Smith v. Ricks, Tex. Civ. App. 308 S. W. (2) 941, in specifically refusing to follow the Slater v. Culpepper case stated:

"In further support of their contention, appellees strenuously urge upon the Court the reasoning employed in Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 37 A.L.R. 2d 1216; Winsberg v. Winsberg, 220 La. 398, 56 So. 2d 730. Both of these decisions follow the holdings of a minority of the courts (See 37 A.L.R. 2d 1216) to the effect that irrespective of the Treasury [fol. 73] regulations, which provide that the co-owner named in a United States Savings Bond, when predeceased by the other co-owner, will be recognized as the sole owner, nevertheless, if the bonds were purchased with community funds, the proceeds thereof remain the community property of the husband and wife under the laws so providing of the State of their residence, and the heirs or legatees of the spouse first dying may proceed in reconvention against the estate of the surviving spouse holding or collecting on the bonds for a one-half interest representing the interest of the spouse first dying.

"The majority of the courts, however, follow the reasoning discussed by the late Associate Justice Smedley in Edds v. Mitchell, 143 Tex. 307, 184 S. W. 2d 823, 829, 158 A.L.R. 470, to the effect that the Federal status

'authorizing the Secretary of the Treasury to issue the bonds, subject to such terms and conditions as he may prescribe, and the Treasury regulations under which they are issued are the valid exercise of the constitutional power to 'borrow Money on the credit of the United States' (article 1 § 8, cl. 2), and that 'no state law can vary the terms of the Federal obligations or derogate from their full enforceability.'"

In 37 A.L.R. 2d, p. 1223, it is stated:

"Right of surviving co-owner, generally.

§ 3. Majority view.

(a) Generally.

"The rule followed by a majority of the courts, frequently called the 'majority rule,' with respect to rights in United States savings bonds registered in the names of two individuals in the alternative, upon the death of one of the co-Owners, is that the surviving co-owner is vested with the sole ownership in such bonds, at least in the absence of fraud or other inequitable conduct on the part of the survivor."

The dissenting opinion of Justice Walker in Ricks v. Smith, [fol. 74] supra, joined in by two other Justices, in (sic) heavily relied upon by appellee as supportive of his position in this case. However, the majority opinion in Ricks v. Smith, supra, written by Chief Justice Hickman, was agreed to by five other Justices of the Supreme Court, with the Supreme Court dividing 6 to 3 on the case. This court accepts the majority opinion in Ricks v. Smith, supra, as being controlling and decisive.

There was no pleading in the case at bar that the purchase of the bonds in question was in fraud of the community property rights of Mary Ida Free. The bonds in question were bought with the Free's community funds and were made payable to either Mr. Free or Mrs. Free, in conformity with the U. S. Treasury regulations, and a full twelve years elapsed between the purchase of the bonds and the death of Mrs. Free, and certainly under this record there was no actual fraud shown on the part of the

husband in investing community funds in the bonds. It is our further view that under this record the purchase of the bonds and their subsequent passing to the appellant by reason of the unpredictable prior death of Mrs. Free (and under the contractual provisions of the U. S. Treasury regulations) does not in law amount to a constructive fraud upon the estate of Mrs. Free. Also, if Mr. Free had died first and the bonds had passed to Mrs. Free under the contractual treasury regulations we do not think it could be held that a constructive fraud had been committed against Mr. Free's estate by the purchase of the bonds in question under the record in this case.

This court, being an intermediate appellate court, will follow the majority opinions of the Supreme Court of Texas. After careful consideration of the matter it is our considered judgment that the majority opinion of the Supreme Court of Texas in Ricks v. Smith, supra, is controlling and decisive of this case and requires that the judgment of the trial court be reversed and rendered in favor of appellant awarding him full title and possession of the bonds in question, and the fruits thereof, free and clear of any and all asserted claims and liens of appellee.

The judgment of the trial court is reversed and judgment is here rendered in favor of appellant for the full title and possession of the bonds in question, and all the fruits thereof, free and clear of any and all claims and liens asserted by appellee.

Reversed and rendered.

Wm. J. Fanning, Associate Justice.

July 12, 1960.

Filed July 12, 1960.

[fol. 75]

IN THE COURT OF CIVIL APPEALS OF TEXAS

Appealed from the District Court of Upshur County.

No. 7223

J. W. FREE, Appellant,

vs.

JAMES F. BLAND, Individually and as Independent Executor, Appellee.

JUDGMENT—July 12, 1960

This cause came on to be heard on the transcript of the record, and the same being inspected, the court is of the opinion that there was error in the judgment of the trial court wherein the court ordered that the appellee, in equity, ought to recover from the appellant one-half of the value of the bonds, and fixed a lien on the proceeds thereof to enforce the judgment; and that the judgment of the trial court should be reversed and rendered in favor of the appellant.

It Is Therefore Ordered, Adjudged and Decreed by the Court that the judgment of the trial court be and the same is hereby reversed and judgment is now here rendered in favor of the appellant J. W. Free, for the full title and possession of the bonds in question, and all the fruits thereof, free and clear of all claims and liens asserted by appellee, James F. Bland, individually and as executor of the estate of Mrs. Ida Free, deceased, and recover of and from the appellee, James F. Bland, individually and as independent executor of the estate of Ida Free, deceased, all costs in this behalf expended both in this court and the court below.

It Is Further Ordered by the Court that the officers of this court and the court below recover of the appellant, J. W. Free, and of The Western Casualty & Surety Company, surety upon appellant's appeal bond, all costs in-

curred by said appellant on this appeal for all of which execution may issue and this decision be certified to the court below for observance.

[fol. 76]

IN THE SUPREME COURT OF THE STATE OF TEXAS

JAMES F. BLAND, Individually and as Independent Executor, Petitioner,

vs.

J. W. FREE, Respondent.

APPLICATION FOR WRIT OF ERROR—Filed October 14, 1960

To the Honorable Supreme Court of the State of Texas:

Statement of the Case

This case involves the question of the ownership of certain United States Savings Bonds, in the aggregate amount of $87,035.50, which were, generally speaking, made payable to John W. Free or Mary Ida Free, all of which were what has commonly been called and referred to as "and/or" bonds. Petitioner in this case is the independent executor of the estate of Mary Ida Free, deceased. Respondent J. W. Free and Mary Ida Free were husband and wife until her death on the 23rd day of April, 1958. Thereafter, petitioner in this case qualified as executor of the estate of the said Mary Ida Free and no question has been raised in this regard. Among the other assets of the estate of Mary Ida Free, deceased, were the bonds involved in this [fol. 76a] controversy. From the year 1941 through the year 1945, the following co-owner bonds were purchased, payable to "Mrs. Mary Ida Free or Mr. John W. Free;" "Mr. John W. Free or Mrs. Mary Ida Free;" "John W. Free or Mrs. Ida Free;" "J. W. Free or Mrs. Ida Free" and "Mr. John W. Free or Mrs. Ida Free," to-wit: Seven "E" bonds of the par value of One Thousand Dollars each; four "F" bonds of the par value of One Thousand Dollars

each; One "F" bond of the par value of Five Thousand Dollars; and seven "F" bonds of the par value of Ten Thousand Dollars each. At the death of Ida Free, all the bonds so purchased were in existence and the co-owner bonds above described were worth $87,035.50.

Respondent originally filed this suit against petitioner in his capacity as independent executor of the estate of Mary Ida Free, deceased, and individually, to recover the title to and possession of said co-owner United States Government Bonds, together with accrued interest thereon, and for a judgment declaring that respondent was the sole owner of said bonds, and that the petitioner had no rights therein.

In his cross action in the trial court, it was and is here the contention of petitioner that inasmuch as the bonds were indisputably purchased with community funds, that he was entitled to one-half (½) of same, or, in the alternative, that the estate of Mary Ida Free should be reimbursed to the extent of one-half of the value of said bonds.

On a hearing of respondent's motion for summary judg- [fol. 76b] ment, the trial court, on November 23, 1959, rendered judgment for respondent for the title to and possession of said bonds, but rendered judgment that petitioner should recover of and against respondent one-half of the value of said bonds, and fixed a lien on the proceeds thereof to enforce the same. On July 12, 1960, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas rendered its opinion reversing the judgment theretofore entered by the trial court, and rendered judgment in favor of appellant "for the full title and possession of the bonds in question, and all the fruits thereof, free and clear of any and all claims and liens asserted by appellee."

Thereafter, and within the time provided by law, petitioner filed his motion for rehearing, which said motion for rehearing was overruled on the 6th day of September, 1960; petitioner having perfected his appeal to this Honorable Court by the filing of this, his Application for Writ of Error, within the time prescribed by law.

The opinion handed down by the Court of Civil Appeals clearly stated the case, from a factual point of view, petitioner disagreeing only with the ultimate result arrived at by the Court of Civil Appeals.

Statement of Jurisdiction

The Supreme Court has jurisdiction of this suit under numbered Paragraph 6 of Article 1728, V.A.T.S., as amended.

Points of Error

[fol. 76c]

First Point

The Court of Civil Appeals erred in not holding that petitioner was entitled to one-half of the bonds in question, or, in the alternative, that petitioner was entitled to one-half of the proceeds of the bonds in question and fixing a lien on the proceeds of such bonds to secure payment of same.

Second Point

The Court of Civil Appeals erred in holding that the respondent should have complete title to ownership of and all of the fruits to be derived from the bonds in question in this law suit, free and clear of any and all rights on the part of petitioner.

Third Point

The Court of Civil Appeals erred in holding that the majority opinion in the case of Ricks v. Smith, 318 S.W. 2d 439, forecloses the right of petitioner herein to a recovery of one-half of the bonds in question, or the value thereof.

First Point Restated

The Court of Civil Appeals erred in not holding that petitioner was entitled to one-half of the bonds in question, or, in the alternative, that petitioner was entitled to one-half of the proceeds of the bonds in question and fixing a lien on the proceeds of such bonds to secure payment of same.

Second Point Restated

The Court of Civil Appeals erred in holding that the respondent should have complete title to ownership of and [fol. 76d] all of the fruits to be derived from the bonds in

question in this law suit, free and clear of any and all rights on the part of petitioner.

Third Point Restated

The Court of Civil Appeals erred in holding that the majority opinion in the case of Ricks v. Smith, 318 S.W. 2d 439, forecloses the right of petitioner herein to a recovery of one-half of the bonds in question, or the value thereof.

Statement and Argument

Petitioner can see no reason in this case why the three points of error should not be grouped and briefed together as a matter of convenience to the Court and all parties. The question at issue in this case is as clearly drawn and framed as any could ever be in a law suit. Essentially, it involves the question of whether or not the case of Ricks v. Smith, 318 S.W. 2d 439, heretofore handed down by this Court, on the 5th day of November, 1958, irrevocably forecloses petitioner in this case. By reason of the differences in the factual situation, the trial court did not think Ricks v. Smith covered the instant case. As is perfectly clear from a reading of the opinion by the Honorable Court of Civil Appeals, that Court thought that it did. This is distinctly stated by the Court in the following language:

> "This court, being an intermediate appellate court, will follow the majority opinions of the Supreme Court of Texas. After careful consideration of the matter it is our considered judgment that the majority opinion of the Supreme Court of Texas in Ricks v. Smith, supra, [fol. 76e] is controlling and decisive of this case and requires that the judgment of the trial court be reversed and rendered in favor of appellant awarding him full title and possession of the bonds in question, and the fruits thereof, free and clear of any and all asserted claims and liens of appellee."

This Court will observe the real reluctance of the Court of Civil Appeals in rendering the judgment that it did.

We will agree that if the reasoning applied by the majority of the Court in Ricks v. Smith is followed to its ultimate conclusion, then it does foreclose the matter. There is one basic difference in the two cases. In the Ricks v. Smith case, the husband died first. In this case, the wife died first. At first blush it might appear that this one simple difference in facts is not enough to distinguish the instant case from the Ricks v. Smith case. But the truth of the matter is that this difference is very vital and all important, in that it would permit the Court to render judgment for petitioner in this case without doing violence to its prior decision.

The difference in factual principal in this case and in the Ricks case is this: Where the husband purchases the bonds and dies first, and the wife then obtains the full benefits of the transaction, then no question of fraud, either real or constructive, could arise on the part of the wife toward the husband. But in a case such as this, while petitioner was not in a position to even allege, much less prove actual fraud, a constructive fraud had actually been perpetrated upon her. The petitioner feels fortunate in being able to present this matter to the Court at such an early [fol. 76f] time in order that the bench and bar of the State of Texas might have the benefit of this Court's final say in the matter and the matter finally laid to rest.

It is the simple contention of the petitioner that the Ricks v. Smith case does foreclose the question in this case and if this Court should be of the opinion that it does, then the opinion in the Ricks v. Smith case would be speedily done away with. If Ricks v. Smith foreclosed the issue in this case, then there would not have been any reason or justification for the dissenting opinion by Justice Walker and the other members of the Court who agreed with him. We are not prepared to bring ourselves to believe that this Honorable Court is going to permit a rule promulgated by an administrative agency of the Federal Government to destroy completely the property rights of the citizens of this State. It is difficult for us to visualize our Court making the statement, "There is no sanctity of the community property law above that of other types of law. To give

supremacy to Federal regulations no more affects community property law than laws of descent and distribution." While we do not agree with the statement of this Honorable Court, as set out, nevertheless, an avenue has been opened by the able trial judge in this case in which full force and effect was given to Departmental Circular No. 530, as revised, and still protect the property rights of one of its citizens, in that the able trial judge held that respondent was entitled to the possession and payment of the bonds, but further provided for and fixed a lien against [fol. 76g] any such proceeds to the extent of one-half the value thereof for the benefit of the petitioner. We understand the reasoning behind this departmental regulation. It was and is to provide a speedy and simple plan of payment for these bonds as a matter of convenience to the Treasury Department of the United States and to prevent this agency from being continually embroiled in litigation as to who owned any such bonds or to whom the proceeds of such bonds should be paid.

The Court of Civil Appeals pointed out in its opinion that petitioner relied principally upon the Slater v. Culpepper case, 222 La. 962, 64 So. 2d 234, 237, 37 A.L.R. 2d 1216, and the opinion in the case of In the Matter of the Estate of Bertha Q. Allen, deceased, 343 P. 2d 867, by the Supreme Court of Washington, and the dissenting opinion of Justice Walker in the Ricks v. Smith case. This is true, and we might add that another case has been decided which gives us further ammunition, and that is the case of Anderson v. Benson, 117 F. Supp. 765. We believe these cited cases and the opinion of Justice Walker to be the better reasoned cases and the reasoning which should necessarily be employed by the Court in this case, but we again invite the attention of the Court to the fact that in this case, the able trial judge did award title and possession of the bonds to respondent, which therefore gives effect to the Ricks v. Smith case, but further provided that petitioner should have one-half of the value of the bonds and fixed a lien on the proceeds thereof to secure the payment of the judg- [fol. 76h] ment rendered. This course seems a happy solution to us in the matter and meets any and all objections that could be leveled against it by anybody.

We have been unable to bring ourselves to believe that this Court will allow the property rights of Mrs. Mary Ida Free to be completely disregarded and ignored and the estate of her husband to be unjustly enriched at her expense, when one-half of the money that went into the purchase of these bonds was hers. We can not believe that this Court is going to permit the property rights of its citizens to rest on so tenuous a thread and question as who dies first. In short, we can not believe that this Court will permit its opinion in the Ricks v. Smith case to take away from the estate of Mary Ida Free the approximately $44,000.00 which rightfully belongs to such estate.

It is true that we place great reliance on the dissenting opinion of Justice Walker in the Ricks v. Smith case, and believe that the question which we present falls squarely in line with the problem which he so wisely envisioned in 1958, when he stated that such cases "present little difficulty provided he (the husband) dies first." We present the case envisioned by Justice Walker and we here adopt as a part of this Application, his opinion in that case, and not only that, but with equal vigor, we refer to such dissenting opinion for the purpose of showing conclusively that the majority opinion in such case does not control the instant case.

With all respect we cite even the majority opinion in the [fol. 76i] Ricks v. Smith case, as authority for the proposition contended for by petitioner here; Anderson v. Benson, 117 F. Supp. 765; In the Matter of the Estate of Bertha Q. Allen, deceased, 343 P. 2d 867 and Slater v. Culpepper, 64 So. 2d 234.

It would be easy to write an Application in this case of forty to fifty pages, but it would seem unnecessary and even a little foolish to do so. The issues are very plain and are well known to the Court.

Conclusion

Petitioner prays that upon consideration of this petition, writ of error be granted, and that, upon final hearing, the

judgment of the Court of Civil Appeals be reversed and that of the trial court affirmed.

Respectfully submitted,

Olin P. McWhirter, Greenville National Bank Bldg., Greenville, Texas; Florence, Garrison & Holt, P. O. Drawer 600, Gilmer, Texas, By F. L. Garrison, Attorneys for Petitioner.

[fol. 77]

IN THE SUPREME COURT OF TEXAS

No. A-8079

JAMES F. BLAND, Individually and as Independent Executor, Petitioner,

vs.

J. W. FREE, Respondent.

RESPONDENT'S REPLY TO APPLICATION FOR WRIT OF ERROR —Filed October 18, 1960

[fol. 77a] To the Supreme Court of Texas:

Respondent, J. W. Free, presents this Reply to the Application for Writ of Error of Petitioner, James F. Bland individually and as executor of the estate of Ida Free, deceased, and respectfully urges that such Application should be refused. The opinion of the Court of Civil Appeals in this case correctly states the law and the judgment of the Court is correct.

Statement of the Case

The nature of and material facts in this cause are correctly stated in the opinion of the Court of Civil Appeals.

Foreword

Petitioner takes the unusual position, as we understand his Application, that the Court of Civil Appeals erred in holding:

1. That the purchase of the co-owner bonds was by a contract creating property rights between the purchaser and the Federal Government under Treasury Regulations which have supremacy, as held by this Court in Ricks v. Smith, 318 S.W.2d 439, and in not following the minority holding announced in the Louisiana and Washington cases of Slater v. Culpepper, 222 La. 962, 64 So.2d 234, 37 A.L.R. 2d 126, and In Re Allen's Estate (Wash.) 343 P.2d 867, that [fol. 77b] the Treasury Regulations merely prescribed a method of payment for the convenience of the Government; and, in the alternative

2. That if the principles of law announced in the Ricks case are upheld, then the rules therein announced are not applicable to this case, where the wife predeceased her husband, such rules being only binding on the husband's estate if he dies first, and never binding on the wife's estate, if she dies before her husband; and

3. That the purchase of the bonds here involved and their subsequent passing to Respondent by the death of his wife, does not in law amount to constructive fraud upon the estate of the wife.

We will discuss these questions in the order raised.

Ricks v. Smith Controls

The Court of Civil Appeals correctly held that this case is ruled by the opinion of this Court in Ricks v. Smith, 318 S.W.2d 439. And such Court, in applying the law as announced in the Ricks case, correctly reversed the judgment of the trial court and rendered judgment for Respondent for the title to and possession of the bonds in question, and all the fruits thereof, free and clear of any and all liens or claims asserted by Petitioner.

In the Ricks case, involving similar co-owner bonds, this Court held that the purchase of the bonds there involved was by a contract between the purchaser and the Treasury

Department to the effect that if either co-owner died with-
[fol. 77c] out the bonds having been presented and surrendered for payment or reissue, the surviving co-owner would be recognized as the sole and absolute owner of said bonds, and payment or reissue would be made only to such survivor, as though the bonds were registered in his name alone. This Court further held that there was no sanctity of community property law above that of other types of law, and to give supremacy to Federal Regulations no more affected community property law than laws of descent and distribution, and that the solution as to the property rights of the surviving co-owner rested in the above contract between the purchaser and the Treasury Department, and that such contract became a part of the bonds at the time of their purchase.

Petitioner in this case wants this Court to set aside its holding in the Ricks case, and rewrite the law in line with the holdings of the Louisiana and Washington courts in Slater v. Culpepper and In Re Allen's Estate, supra. This Court declined to follow the reasoning in the Louisiana case of Slater v. Culpepper when it wrote its opinion in Ricks v. Smith, and there is no good reason why it should now follow such reasoning.

In the Louisiana and Washington cases, the Courts of those States refused to give controlling effect to the Treasury Regulations incorporated in the bonds there involved, holding that to do so would nullify community property laws of such states. The fallacy of that reasoning is ably [fol. 77d] demonstrated by this Court in the Ricks case, in the following language, (318 S.W.2d 440):

> "There is no sanctity of the community property law above that of other types of law. To give supremacy to Federal regulations no more affects community property law than laws of descent and distribution. The solution as to the property rights of the surviving co-owner of 'or' bonds rests in contract, and that contract becomes a part of the bonds."

Both the Louisiana and Washington decisions follow the holding of the minority that the contract between the

purchaser of the bonds and the Treasury Department, which were incorporated as a part of said bonds, did not constitute property rights, but only provided a method of payment for the convenience of the Treasury Department, and that the heirs or legatees of the spouse first dying could proceed against the estate of the surviving spouse collecting said bonds, for a one-half interest representing the community interest of the spouse first dying.

No good reason is shown why this Court should retreat from its prior holding in the Ricks case. Identical co-owner bonds are involved here as they were in that case. The bonds here were purchased under the identical contract as the bonds in the Ricks case. The same contract in the Ricks case became a part of the bonds in that case and in this case. The two cases are identical and the holding in this case should be (and was) identical to the holding in the Ricks case, and this Court should refuse the Application for Writ of Error.

[fol. 77e]

Petitioner Bound by Rule in Ricks Case

Petitioner urges that if the principles of law announced by this Court in the Ricks case are upheld, then those rules are not binding on the Petitioner in this cause, because Mrs. Free, the wife, predeceased her husband, the Respondent, and such rules are only binding on the husband's estate, if he dies first, and are never binding on the wife's estate, if she dies before her husband. This argument is without merit. The law announced in the Ricks case is a uniform rule governing ownership of co-owner bonds after the death of either one of the co-owners. It would indeed be a strange rule of law that binds one co-owner, but did not bind the other co-owner.

As above stated, the co-owner bonds in this case are identical to the co-owner bonds in the Ricks case. The contract between the Treasury Department and the purchasers of the bonds are identical in both cases. The only factual difference is that in the Ricks case the husband predeceased the wife, and in this case, the wife predeceased the husband. Therefore, Petitioner argues, the rule in the

Ricks case is not applicable to this case. His only authority is the dissenting opinion in the Ricks case, (318 S.W.2d 441-444). Indeed, Petitioner's whole case is bottomed on the dissent in the Ricks case.

[fol. 77f] A dissenting opinion simply expresses the views of the dissenters, and is not controlling authority for any principle therein announced. Certainly, if this Court had thought the reasoning announced in the dissenting opinion was good Texas law, it would have adopted that opinion as the opinion of the Court. However, this Court thought otherwise, and the dissenting opinion therefore carries no weight.

In the dissenting opinion in the Ricks case, it was urged that the opinion of the Court was wrong; that the Court should hold that upon the death of the husband, the wife as surviving co-owner of the bonds was under a duty to account to the husband's estate for one-half of the value of the bonds at the time of his death; otherwise, the Court would find itself in a position in the future that might either prove untenable or lead to inconsistent or undesirable results. The dissenting opinion further observed that since there was nothing to prevent a husband from making a contract affecting community property for the benefit of his wife, a case in which he invests community funds in bonds payable to himself and his wife presents little difficulty providing the husband dies first. However, the dissent continues, if the wife dies first this Court might be required to hold that the purported contract entered into between the husband and the Treasury Department in the purchase of said bonds was ineffective, because the wife was not a party to that contract, and that absolute owner-[fol. 77g] ship of the bonds might not vest in the surviving husband as co-owner.

The unsoundness of this reasoning lies in the fact that the dissenting opinion is predicated on the false assumption that the husband can make contracts affecting community property *only* for the *benefit* of the wife, and on the further false assumption that the wife was not a party to the contract with the Government.

The falsity of this position is apparent when one considers the effect of Article 4619, Revised Statutes, which

provides, among other things, that "during coverture the common property of the husband and wife may be disposed of by the husband only." Under the above statute, it has been consistently held by this Court and by all the Courts of Civil Appeals, that the husband has the full and absolute right to dispose of community property, even by gift, when not in fraud of the rights of his wife. The courts have proceeded along the theory that the husband is the agent for the wife in the management, control and disposition of the community property, and his acts, when not in fraud of her rights, are binding on her. A few of the cases announcing this doctrine follows:

Boehm v. Beutler, (Com. App.) 41 S.W. 658;
Jackson v. Bradshaw, (Com. App.) 57 S.W. 878;
Gulf, C. & S. F. Ry. Co. v. Fenn, (Com. App.) 76 S.W. 597;
[fol. 77h] Sweeney v. Taylor Bros. (Com. App.) 92 S.W. 442;
Stone v. Jackson, 109 Tex. 385, 210 S.W. 953;
Bell v. Crabb, (Com. App.) 244 S.W. 371;
Shaw v. Shaw, (Tex. Civ. App.) 28 S.W.2d 173;
Gulf Production Company v. Continental Oil Co., (Tex. Civ. App.) 61 S.W.2d 185, affd. 139 Tex. 183, 164 S.W.2d 488;
Krueger v. Krueger, (Tex. Civ. App.) 62 S.W.2d 684;
Mitchell v. Simms, (Com. App.) 63 S.W.2d 371;
Atkins v. Dodds, (Tex. Civ. App.) 121 S.W.2d 1010;
McJunkin v. Republic National Bank, (Tex. Civ. App.) 131 S.W.2d 1085;
Dixie Motor Coach Corp. v. Watson, (Tex. Civ. App.) 138 S.W.2d 314.

In Locke v. Locke, (Tex. Civ. App.) 143 S.W.2d 637, the jury found that the husband, between the date of separation and the date of divorce, converted to his own use, in excess of his living expenses and other necessary expenditures, the sum of $3,900, and the trial court entered judgment for the amount in favor of the wife. In holding that the trial court erred, the Court of Civil Appeals said, (p. 638):

"... Mr. Locke was not guilty of any fraud toward appellee, Mrs. Locke, in the handling of the community estate. The statute, Vernon's Ann. Civ. St. Art. 4619, provides that the community property 'may be disposed of by the husband only.' Such right of the husband to manage, control, and dispose of the community property is absolute so long as it is not exercised for the purpose of defrauding the wife. Jones v. Jones, Tex. Civ. App., 146 S.W. 265. And, barring any disposition [fol. 77i] or dissipation of the property made with intent to defraud the wife, the husband may sell or even give it away. Shaw v. Shaw, Tex. Civ. App., 28 S.W.2d 173. It was therefore essential that Mrs. Locke establish fraud toward her on the part of the appellant in his management of the community property *as a predicate for her right to recover the $3,900 item.*" (italics ours).

It is seen by the above statutes and authorities that the husband, during the existence of the marriage, has absolute control, management and the power to dispose of the community property, other than the homestead, the only limitation being that he must not exercise such power in fraud of the rights of his wife. He can make contracts affecting the community, whether beneficial or detrimental, as long as those contracts are not made with fraudulent intent to defeat his wife's rights.

Therefore, it is seen that when Respondent purchased the bonds involved in this action under a contract with the Secretary of Treasury, (that if either he or his wife died prior to payment or reissuance of said bonds, that the survivor would be recognized as the sole owner and payment would be made only to the survivor), that the wife by virtue of the statute itself, was a party to such contract and bound thereby, in the absence of fraud on her rights. The contract made by Respondent was one authorized by Texas law, and was binding upon his wife, in the absence of intent to defraud the wife out of a part of her interest in the community property, which was neither alleged nor proved.

[fol. 77j] Certainly, Respondent's purchase of the co-owner Government bonds here involved, with community funds, of itself, could never be considered in fraud of the rights of his wife. He thought he was making contracts for the benefit of his wife. The bonds could have been cashed by her at any time without Respondent's joinder. If Respondent had died first, (which he thought would happen), the bonds, and all the fruits thereof, would have belonged to the wife and the estate of Respondent would not have had and could never have recovered any interest therein. Also, it should be noted in this case that there were no allegations or proof of any fraud whatever in the purchase of said bonds.

No Constructive Fraud

While Petitioner admits that there is no pleading or proof in this case raising any issue of fraud by Respondent to his wife, yet he insists that the purchase of the co-owner bonds and their subsequent passing to Respondent by the death of his wife, amounts in law to constructive fraud upon the estate of his wife. This is nonsense.

The Court of Civil Appeals in this case held that "a full twelve years elapsed between the purchase of the bonds and the death of Mrs. Free, and certainly under this record there was no actual fraud shown on the part of the husband in investing community funds in the bonds."

That Court further held that under the record in this case, "the purchase of the bonds and their subsequent pass-
[fol. 77k] ing to Appellant (Respondent) by reason of the unpredictable prior death of Mrs. Free (and under the contractual provisions of the U. S. Treasury Regulations) does not in law amount to a constructive fraud upon the estate of Mrs. Free."

Conclusion

The judgment rendered by the Court of Civil Appeals in this case awarding to Respondent the full title to and possession of the bonds in question, and all the fruits thereof, free and clear of any and all claims and liens asserted by Petitioner, is correct and the only judgment that

it could render under the law of this State. Its opinion is sound and correctly applies the rule announced in the Ricks case.

Petitioner's Application for Writ of Error is without merit and should be refused.

Respectfully submitted,

Fulton, Hancock & McClain, Edwin M. Fulton, Box 500, Gilmer, Texas, Attorneys for Respondent.

[fol. 78]

IN THE SUPREME COURT OF TEXAS

No. A-8079

From Upshur County, Sixth District.

JAMES F. BLAND, Individually and as Independent Executor, Petitioner,

v.

J. W. FREE, Respondent.

PER CURIAM—March 8, 1961

The opinion of the Court of Civil Appeals, reported in 337 S.W. 2d 805, followed our holding in the case of Ricks v. Smith, 159 Tex. 280, 318 S.W. 2d 439 (1958).

Our action on this application for writ of error was held in abeyance until the case of Hilley v. Hilley should be decided because that case would determine our holding in this cause. Prior to our action on this application for writ of error we decided the case of Hilley v. Hilley, (Vol. 4, The Texas Supreme Court Journal, p. 213, Jan. 28, 1961) in which the case of Ricks v. Smith was overruled. The decision of the Court of Civil Appeals in the present case is in conflict with our opinion in the Hilley case.

Under the discretion given us by Rule 483, Texas Rules of Civil Procedure, we reverse the judgment of the Court of Civil Appeals in this case and affirm the judgment of the trial court.

[fol. 79]

IN THE SUPREME COURT OF TEXAS, AUSTIN

No. A-8079

From Upshur County, Sixth District.

JAMES P. BLAND,

vs.

J. W. FREE.

JUDGMENT—March 8, 1961

Application of petitioner, James W. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, for writ of error to the Court of Civil Appeals for the Sixth District having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, but no error in the judgment of the District Court, it is therefore *adjudged, ordered* and *decreed* that, under Rule 483, Texas Rules of Civil Procedure, the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and the judgment of the District Court be, and hereby is, affirmed, in accordance with the per curiam opinion herein this day delivered.

It is further ordered that respondent, J. W. Free, and the surety on his appeal bond, The Western Casualty & Supply Co., pay all costs in this cause expended and incurred in this Court and the Court of Civil Appeals; that petitioner, James W. Bland, individually and as Independent Executor of the Estate of Ida Free, deceased, have and recover of and from respondent, J. W. Free, and surety, Western Casualty and Supply Co., the costs by him expended and incurred in said courts, and that this decision be certified to both the Court of Civil Appeals for the Sixth Supreme Judicial District and the District Court of Upshur County, Texas, for observance.

[fol. 80]

IN THE SUPREME COURT OF TEXAS

No. A-8079

JAMES F. BLAND, Individually and as Independent Executor, Petitioner,

v.

J. W. FREE, Respondent.

RESPONDENT'S MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR—Filed March 21, 1961

[fol. 80a] To the Honorable Supreme Court of the State of Texas:

J. W. Free, Respondent herein, respectfully moves the Court to set aside the judgment of this Court rendered on the 8th day of March, A.D. 1961, reversing the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District, at Texarkana, Texas, and affirming the judgment of the trial Court, and to grant him a rehearing and affirm the judgment of said Court of Civil Appeals by refusing the Application for Writ of Error, and as grounds therefor would show:

1.

That this Court erred in failing to give supremacy and controlling effect to the applicable Federal law as is provided in the Constitution of the United States, Art. 6, Clause 2.

2.

That this Court erred in holding that the applicable Federal law, as contained in the Constitution of the United States, the Statutes of the United States and the regulations of the United States Treasury Department pertaining to United States Savings Bonds did not control the rights

and title of the parties arising by virtue of the purchase of said bonds.

[fol. 80b]

3.

That this Court erred in holding that the validity and construction of the contract between Respondent and the United States Government whereby the United States Savings Bonds were purchased, the consequences of such contract on the rights and obligations of the parties thereto, and the titles and liens which such contract created or permits, are not controlled by Federal law.

4.

That this Court erred in holding that the rights and title created by a contract with the United States Government for the purchase of United States Savings Bonds are controlled by the law of the State of Texas.

5.

That this Court erred in not discussing the Federal questions involved herein by the novel application of Rule 483, Texas Rules of Civil Procedure, to reverse the judgment of the Court of Civil Appeals on the authority of dicta contained in an opinion rendered by this Court long subsequent to the decision of said Court of Civil Appeals.

6.

That this Court erred in holding that the community property laws of the State of Texas are supreme and override the provisions of Federal law applicable to property rights created by a contract of a citizen of the United States residing in Texas with the United States Government.

[fol. 80c]

7.

That this Court erred in holding that the Probate Code of the State of Texas limits the right of a resident of Texas to enter into a contract with the United States Government for the purchase of United States Savings Bonds that

contain the co-owner provisions authorized and required by Federal law.

8.

That this Court erred in holding the funds recognized as community funds by the law of Texas cannot be invested in co-owner United States Savings Bonds so as to give to the purchaser thereof the rights, titles and interest such contract with the United States Government gives the parties thereto under the applicable Federal law.

9.

That this Court erred in holding that the opinion of the Court of Civil Appeals herein is in conflict with this Court's opinion in the case of Hilley v. Hilley, rendered on January 28, 1961, and reported in Volume 4, The Texas Supreme Court Journal, page 213, because the contract involved in the Hilley case was not a contract to which the Government of the United States was a party.

10.

That this Court erred in holding that Rule 483, Texas Rules of Civil Procedure, is applicable to this case because [fol. 80d] the opinion of the Court of Civil Appeals herein was not in conflict with a "previous" opinion of this Court, because the Hilley case was handed down on January 28, 1961, and the Court of Civil Appeals had entered its decision on July 12, 1960, over six months prior to this Court's opinion in the Hilley case, and the opinion of the Court of Civil Appeals conformed to the decision of this Court in the case of Ricks v. Smith, 159 Tex. 280, 318 S.W.2d 439, which was, and is the only other case this Court has ever written involving the rights of a surviving co-owner of United States Savings Bonds.

11.

That this Court erred in holding that the law of the State of Texas controlled and was supreme to Federal law, in determining the nature of the rights of the parties created

by the issuance of the United States Savings Bonds involved herein.

Wherefore, premises considered, Respondent prays that this Motion for a Rehearing be granted and that Petitioner's Application for a Writ of Error herein be refused.

Respectfully submitted,

Fulton, Hancock & McClain, W. C. Hancock, Box 500, Gilmer, Texas, Attorneys for Respondent.

[fol. 81]

IN THE SUPREME COURT OF TEXAS, AUSTIN

No. A-8079

From Upshur County, Sixth District.

JAMES F. BLAND,

vs.

J. W. FREE.

ORDER OVERRULING MOTION FOR REHEARING—April 5, 1961

Respondent's motion for rehearing on the judgment entered on March 8, 1961, reversing judgment of the Court of Civil Appeals and affirming judgment of the District Court, under Rule 483, Texas Rules of Civil Procedure, in the above numbered and entitled cause, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

[fol. 82]

IN THE SUPREME COURT OF TEXAS

No. A-8079

From Upshur County, Sixth District.

JAMES F. BLAND,

vs.

J. W. FREE.

ORDER STAYING MANDATE

Motion of respondent, J. W. Free, to stay issuance of mandate pending application for writ of certiorari to the Supreme Court of the United States, filed in the above numbered and entitled cause on April 7, 1961, having been duly considered by the Court, it is ordered that said motion be, and hereby is, granted, and that mandate of this Court in said cause not be issued pending respondent's application for writ of certiorari to the Supreme Court of the United States, and the termination thereof, or until the further orders of this Court.

[fol. 88] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 89]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 9, 1961

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JUL 5 1961
JAMES R. BROWNING, Clerk

No. 205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

J. W. FREE, *Petitioner,*

v.

JAMES F. BLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

J. W. FREE, *Petitioner,*

v.

JAMES F. BLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioner John W. Free prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas in the above-entitled case.

OPINIONS BELOW

The District Court of Upshur County, Texas, rendered no opinion. Its judgment (R. 61) appears in Appendix B hereto at p. 3a. The opinions of the Texas Court of Civil Appeals (R. 70) and of the Supreme Court of Texas (R. 78) are reported at 337 S.W. 2d 802 and 344 S.W. 2d 435, respectively. They appear in Appendix B at pp. 5a and 11a, respectively. The

judgment of the Supreme Court of Texas appears in Appendix B at p. 12a. The opinion of that court in *Hilley* v. *Hilley*, which was held by the court to control the instant case, is reported at 342 S.W.2d 565 and appears in Appendix B at p. 13a.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on March 8, 1961 (R. 79). A timely petition for rehearing filed by petitioner was denied by that court on April 5, 1961 (R. 81). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Do the regulations promulgated by the Secretary of the Treasury of the United States with respect to the registration of, and other matters concerning, United States Savings Bonds prescribe merely a convenient method for the discharge by the United States of its obligations on such bonds, or, as the courts of many states have held and the Treasury Department of the United States has consistently urged, do these regulations also, in the absence of fraud, control the beneficial ownership of such bonds irrespective of the laws of particular states?

STATUTE AND REGULATIONS INVOLVED

This case involves the interpretation of certain Regulations promulgated by the Secretary of the Treasury of the United States in the exercise of the authority vested in him by 31 U.S.C. § 757c(a). That statute provides:

> "The Secretary of the Treasury, with the approval of the President, is authorized to issue from time to time, through the Postal Service or otherwise, United States savings bonds and United

States Treasury savings certificates, the proceeds of which shall be available to meet any public expenditures authorized by law, and to retire any outstanding obligations of the United States bearing interest or issued on a discount basis. The various issues and series of the savings bonds and the savings certificates shall be in such forms, shall be offered in such amounts, subject to the limitation imposed by section 757b of this title, and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b)-(d) of this section, and including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe."

The pertinent regulations, 31 C.F.R. § 315.0, *et seq.*, are set forth in Appendix A.

STATEMENT

Petitioner John W. Free and his late wife, Ida Free, lived during the many years of their marriage and until Mrs. Free's death together in the State of Texas (R. 4). During the marriage, in the years 1941 through 1945, petitioner purchased a number of United States Savings Bonds of the "E" and "F" series, using for that purpose community funds of himself and his wife, and registered each of them in the names of himself "or" his wife (R. 5-6).* The relevant regulations of the Secretary of the Treasury provide that under this form of registration the persons named are "coowners" of the bonds (31 C.F.R. § 315.7(a)(2)), and that upon the death of one "the survivor will be

* The bonds were variously registered in the names of "Mrs. Mary Ida Free or John W. Free", "John W. Free or Mrs. Mary Ida Free", "John W. Free or Mary Ida Free", "John W. Free or Mrs. Ida Free", and "J. W. Free or Mrs. Ida Free". In each case the designation referred to petitioner and his wife.

recognized as the sole and absolute owner" (31 C.F.R. § 315.61).

Ida Free died testate in Texas in April 1958. In her will respondent James F. Bland, a son of Ida Free by a previous marriage, was named both executor and the sole legatee (R. 5-6).

In June 1959 petitioner brought suit in the District Court of Upshur County, Texas (R. 3), seeking a judicial declaration that upon the death of his wife petitioner became the sole owner of the bonds above referred to, and that respondent had no interest in said bonds either as executor of the estate of Ida Free or as legatee under her will. Respondent answered, controverting petitioner's claim, and filed a cross-action alleging that because the bonds had originally been purchased with community property of petitioner and Ida Free, respondent became the owner of a one-half interest in the bonds at the date of Ida Free's death or was in any event entitled to a judgment against petitioner for a sum equal to one-half the value of the bonds.

On petitioner's motion for summary judgment (R. 28), the District Court adjudged petitioner to be the owner of the bonds in controversy. At the same time, however, the court entered judgment for respondent against petitioner for one-half the value of the bonds, and declared a lien against the bonds for the amount of this judgment. In substance, therefore petitioner's claim that he was entitled to absolute ownership of the bonds was rejected and respondent's claim was upheld.

Petitioner appealed to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, urging that the trial court had erred in failing to follow a controlling decision of the Texas Supreme Court

(*Ricks* v. *Smith*, 318 S.W. 2d 439 (1958)) which had held that questions of ownership of and rights in United States Savings Bonds are controlled not by state law but by the federal regulations, duly promulgated by the Secretary of the Treasury of the United States, under which those bonds are issued. The Court of Civil Appeals affirmed the judgment of the trial court insofar as it found petitioner to be the owner of the bonds, and reversed that judgment insofar as it had awarded to respondent one-half their value, agreeing with petitioner that the case was directly controlled by *Ricks* v. *Smith*, *supra*, which had held the federal regulations to be applicable and dispositive. The court expressly noted that respondent had not alleged that petitioner's action in purchasing and registering the bonds had constituted a fraud, actual or constructive, upon petitioner's wife, and that the facts of record demonstrated the absence of any fraud.

Respondent sought review of this judgment in the Texas Supreme Court by writ of error (R. 76). While the application for the writ was pending that court, in *Hilley* v. *Hilley*, 342 S.W. 2d 565 (1961), a case involving not United States Savings Bonds but corporate securities, held that a coownership form of registration did not serve to alter the normal operation of Texas community property rules. In the course of its opinion the court overruled its prior decision in *Ricks* v. *Smith*, stating that "the federal regulations [dealing with the ownership of United States Savings Bonds] do not override our local laws in matters of purely private ownership * * *", and that accordingly United States Savings Bonds registered in the names of a husband and a wife as coowners should on the death of one be treated not as the property of the other, as

provided by the regulations, but, under Texas property law, as community property. On the basis of this decision the Texas Supreme Court thereupon reversed the judgment of the Court of Civil Appeals in this case and affirmed that of the trial court (R. 78).

The federal question which petitioner asks this Court to review on writ of certiorari was, in accordance with Texas practice, raised in petitioner's brief in the Court of Civil Appeals, both in terms and by reliance on *Ricks* v. *Smith, supra* (R. 69, pp. 6-15), and was decided by that court in petitioner's favor on the authority of *Ricks* v. *Smith*. The question was again raised in petitioner's reply to respondent's Application for Writ of Error to the Supreme Court of Texas (R. 77, pp. 3-7), which was filed prior to that court's decision in *Hilley* v. *Hilley,* and after it was decided by that court in a manner adverse to petitioner on the authority of *Hilley* v. *Hilley,* was again raised in a motion for rehearing addressed by petitioner to that court (R. 80).

REASONS FOR GRANTING THE WRIT

The Supreme Court of Texas has held that Texas law governing the transfer of personal property may be applied to United States Savings Bonds and their proceeds in a manner which derogates from the interests of the person recognized by the federal regulations under which those bonds were issued as their sole and absolute owner, and which appears to violate the command of those regulations that no judicial determination shall "defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner or beneficiary * * *." See 31 C.F.R. § 315.20. In so doing that court has resolved a fre-

quently-recurring federal question as to the proper interpretation of the pertinent regulations in a manner contrary to the resolution of that question by the courts of a great majority of the many other states which have had occasion to rule upon it, and has introduced doubt, confusion and uncertainty into an area where the exercise by the United States of its constitutional power to borrow money on conditions uniform throughout the Country is intimately involved and where the property interests of literally millions of citizens are at stake.

Petitioner does not understand the Texas Supreme Court to have held that the federal regulations upon which he relies are invalid if given the interpretation for which he contends. Rather, the basic question involved in this case is one of statutory interpretation:[1] whether those regulations are intended merely to provide a convenient method whereby the United States can discharge its obligation on United States Savings Bonds by payment, leaving the states entirely free to order any retransfer of the proceeds of such bonds which they deem necessary to comport with their personal property law, or whether the regulations are intended to and do have a broader reach and effect.

The decision below, in holding that the relevant regulations do not override concepts of Texas property law dealing with the methods by which community property may be transferred, is in direct conflict with the

[1] Federal regulations promulgated in the proper exercise of a constitutional power properly delegated by Congress of course have in all respects the force and effect of federal law, United States v. Birdsall, 233 U.S. 223; Maryland Cas. Co. v. United States, 251 U.S. 342; United States v. Janowitz, 257 U.S. 42, and accordingly by virtue of Article VI of the Constitution of the United States are "the supreme law of the land * * *."

holdings of the courts of many states which have rejected the "mere convenience to the United States" interpretation of those regulations.[2] Among these decisions, which have recognized that the regulations are designed to make possible the creation of interests in federal obligations which will receive uniform recognition and treatment throughout the United States, and that they thus must be interpreted, at least in the absence of fraud, to determine and control the beneficial ownership of United States Savings Bonds irrespective of the law of a particular state, are:

Alabama (*Ex parte Little*, 67 So. 2d 818 (1953); *Chambless* v. *Black*, 35 So. 2d 348 (1948))
Arizona (*Lee* v. *Anderson*, 70 Ariz. 208, 218 P. 2d 732 (1950))
Arkansas (*Myers* v. *Hardin*, 186 S.W. 2d 925 (1945))
Florida (*In re Briley's Estate*, 21 So. 2d 595 (1945))
Georgia (*Knight* v. *Wingate*, 52 S.E. 2d 604 (1949))
Kansas (*Lemon* v. *Foulston*, 169 Kan. 372, 219 P. 2d 388 (1950))
Maine (*Berman* v. *Frendel*, 148 A. 2d 93 (1959); *Harvey* v. *Rackliffe*, 41 A. 2d 455 (1945))
Massachusetts (*Reynolds* v. *Reynolds*, 90 N.E. 2d 338 (1950))
Montana (*Nelson* v. *Wheeler*, 256 P. 2d 1080 (1953))
Nevada (*Stephens* v. *First Nat'l Bank*, 196 P. 2d 756 (1948))

---

[2] The Texas court, although in the distinct minority of the courts which have ruled on this question, is not alone. See, *e.g.*, Slater v. Culpepper, 222 La. 962, 64 So. 2d 234 (1953). Accordingly, its decision cannot be dismissed as a mere aberration.

New Jersey (*Reynolds* v. *Danko*, 134 N.J. Eq. 560, 36 A. 2d 420 (1944); *Franklin Washington Trust Co.* v. *Beltram*, 133 N.J. Eq. 11, 29 A. 2d 854 (1943))
New York (*In re Deyo's Estate*, 180 Misc. 32, 42 N.Y.S. 2d 379 (Surr. N.Y. County 1943))
North Carolina (*Ervin* v. *Conn*, 225 N.C. 267, 34 S.E. 2d 402 (1945))
Ohio (*In re DiSanto's Estate*, 142 Ohio St. 223, 51 N.E. 2d 639 (1943))
Oklahoma (*Barton* v. *Hooker*, 283 P. 2d 514 (1955))

Similarly, the decision below is in direct conflict with the formally expressed view of the Treasury Department of the United States, which is charged by law with the administration of the Savings Bond program, to the effect that "* * * state laws, as for example, the law of wills or of intestate succession, or laws governing given forms of tenancy, or the common law related to delivery in the case of gifts, have no bearing whatsoever on the problem and * * * judicial decisions based thereon are in derogation of the supreme law of the land." *Statement of the Treasury Department on the Rights of Surviving Coowners and Beneficiaries of Savings Bonds*, October 1, 1958 (Fifth Revision).[3]

It has occasionally been held that in instances where to give conclusive effect to the relevant regulations would be to permit or further the perpetration of a fraud, these regulations need not be interpreted as demanding that result. See, *e.g.*, *Union Nat'l Bank*

[3] In view of this Statement of Position by the affected Federal Department, and in view of the direct interest of the United States in the proper resolution of the question here presented, this Court may think it appropriate to ask the United States for an expression of its views at this or a subsequent stage in this proceeding.

v. Jessell, 215 S.W. 2d 474 (Mo. 1948); *Hill* v. *Havens*, 48 N.W. 2d 870 (Iowa 1951). Whether or not decisions of this tenor are correct, it is plain that they have no application or relevance to the instant case. As pointed out above, the Texas Court of Civil Appeals expressly held that no fraud, actual or constructive, had been pleaded or established by respondent, noting that more than twelve years passed between the purchase of the bonds and the death of Mrs. Free, and that had petitioner predeceased his wife the bonds would under the regulations have passed to her outright. In reversing the judgment of that court the Texas Supreme Court did not purport to disturb this holding, but rather rested its decision exclusively on the altogether different, and far broader, grounds articulated by it in *Hilley v. Hilley, supra*, a case in which concepts of fraud played no part.[4]

---

[4] That the rationale of Hilley had nothing to do with fraud is demonstrated by the fact that the court in that case expressly overruled Ricks v. Smith and thus decided that under Texas law the estate of a deceased coowner of United States Savings Bonds purchased with community property is entitled to one-half their value even if it was the deceased coowner who originally purchased the bonds.

Under the law of Texas petitioner was at liberty during the period of his marriage to dispose of the community property, even for his own independent purposes, in any way he saw fit so long as that disposition was not made for the purpose of defrauding his wife. Tex. Rev. Civ. Stat. art. 4619; Locke v. Locke, 143 S.W. 2d 637 (Tex. Civ. App. 1940); Shaw v. Shaw, 28 S.W. 2d 173 (Tex. Civ. App. 1930); *cf.* Warthan v. Haynes, 155 Tex. 143, 288 S.W. 2d 481 (1956).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1961

APPENDIX A

31 C.F.R. § 315.0, et seq.

"§ 315.0 *Applicability of regulations.* The regulations in this part apply generally to all United States Savings Bonds of all series of whatever designation, bearing any issue dates whatever, except as otherwise specifically provided herein."

"§ 315.5 *General.* United States Savings Bonds are issued only in registered form. The form of registration used must express the actual ownership of and interest in the bond and, except as otherwise specifically provided in Subpart E and § 315.48 of Subpart I of this part, will be considered as conclusive of such ownership and interest. • • •"

"§ 315.7 *Authorized forms of registration.* Subject to any limitations or restrictions contained in these regulations on the right of any person to be named as owner, coowner, or beneficiary, savings bonds may be registered in the following forms:

"(a) *Natural persons.* In the names of natural persons in their own right.

• • •

"(2) *Coownership form—two persons (only).* In the alternative as coowners. Example:

'John A. Jones or Mrs. Ella S. Jones.'"

§ 315.20 *General.* (a) No judicial determination will be recognized which would give effect to an attempted voluntary transfer inter vivos of a bond or would defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner or beneficiary, and all other provisions of this subpart are subject to this restriction. Otherwise, a claim against an owner or coowner of a savings bond and conflicting claims as to ownership of, or interest in, such bond as between coowners or between the registered owner and beneficiary will be recognized, when established by valid judicial proceedings, upon pres-

entation and surrender of the bond, but only as specifically provided in this subpart."

"§ 315.61 *After the death of one or both coowners.* If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner. Thereafter, payment or reissue will be made as though the bond were registered in the name of the survivor alone (see Subpart K), except that a request for reissue by him must be supported by proof of death of the other coowner, and except further that after the death of the survivor proof of death of both coowners and of the order in which they died will be required. The presentation and surrender of a bond by one coowner for payment establishes his right to receive the proceeds of the bond, and if he should die before the transaction is completed, payment will be made to the legal representative of, or persons entitled to, his estate in accordance with the provisions of Subpart N. If either coowner dies after the bond has been presented and surrendered for authorized reissue (see § 315.47), the bond will be regarded as though reissued during his lifetime."

APPENDIX B

IN THE DISTRICT COURT OF UPSHUR COUNTY, TEXAS

115TH JUDICIAL DISTRICT

J. W. FREE

v.

JAMES F. BLAND, Individually and as Independent Executor

No. 12,109

Judgment

On the 23rd day of October, A. D. 1959, came on for trial and hearing the Motion for Summary Judgment, heretofore filed herein by Plaintiff, J. W. Free, on July 31, 1959, and all parties appeared in person or by their attorneys and announced ready for trial on said Motion, and the Court, after hearing said Motion, finds that the same has been made in proper form and time, and that proper service thereon has been made, and that all parties are before the Court; and,

The Court, having considered the pleadings on file and the affidavits, finds that they show an absence of any genuine issue as to any material fact, and that judgment should be rendered for Plaintiff, J. W. Free, adjudging him to be the owner of the United States Government Bonds sued for herein; and,

It further appearing to the Court that said bonds were purchased by J. W. Free with the community funds of himself and his wife, Ida Free, now deceased, and were of the value of $87,035.50 at the death of Ida Free, and the Court finds that judgment should be rendered for James F. Bland, as Independent Executor of the Estate of Ida Free, and as sole legatee and devisee under the will of Ida Free, deceased, against the said J. W. Free for the sum of $43,517.75, being one-half of the value of said United States Government Bonds at the death of Ida Free, and that a lien

should be fixed and foreclosed against the proceeds thereof to secure the payment of such sum;

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court, on this the 23rd day of November A. D. 1959, that the Plaintiff, J. W. Free, do have and recover of and from the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, judgment for the title to and possession of the United States Government Bonds, more particularly described in Plaintiff's Original Petition, and in Plaintiff's Motion for Summary Judgment; and,

It is FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, do have and recover of and from J. W. Free, the sum of $43,517.75, one-half of the value of said United States Government Bonds at the death of Ida Free, and a lien on said one-half of said proceeds is here fixed to secure the payment of this judgment and such lien is hereby foreclosed and Plaintiff and Defendant may have such writs and other processes as are necessary or advisable to enforce this judgment.

The costs herein are taxed against Plaintiff and execution shall issue for the collection thereof.

Plaintiff, J. W. Free, in open Court, duly excepted to said judgment and gave notice of appeal to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana.

LOONEY E. LINDSEY
Judge Presiding

Endorsed: No. 12,109 J. W. Free vs. James F. Bland, individually and as independent executor. Judgment filed Nov. 23, 1959, Edward Poole, District Clerk, Upshur Co. Texas.

IN THE COURT OF CIVIL APPEALS
FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

J. W. FREE, *Appellant*,

v.

JAMES F. BLAND, Individually, and as Independent Executor,—*Appellee*.

No. 7223

Appeal from the District Court of Upshur County, Texas

Appellant, J. W. Free, sued appellee James F. Bland, individually and as independent executor of the estate of Mary Ida Free, for recovery of the title to and possession of certain United States Savings Bonds, together with accrued interest thereon, and for a judgment declaring that appellant was the sole owner of said bonds and that appellee had no rights therein.

Both parties are in agreement upon the essential facts of the case. J. W. Free and Mary Ida Free were husband and wife until her death on April 23, 1958. Among other United States Savings bonds purchased during this marriage, from the years 1941 through 1945, were the following co-owner bonds, payable to "Mrs. Mary Ida Free or Mr. John W. Free"; "Mr. John W. Free or Mrs. Mary Ida Free"; "John W. Free or Mrs. Ida Free"; "J. W. Free or Mrs. Ida Free"; and "Mr. John W. Free or Mrs. Ida Free", to-wit: seven "E" bonds of the par value of $1,000.00 each; four "F" bonds of the par value of $1,000.00 each; one "F" bond of the par value of $5,000.00; and seven "F" bonds of the par value of $10,000.00 each. Upon the death of Mary Ida Free, all the co-owner bonds listed above were uncashed, having an aggregate value of $87,035.50. Mary Ida Free's written will, duly probated in Upshur County, Texas, vested the bulk of her estate in her son, James F. Bland, appointing him independent executor, for which he duly qualified.

In appellee's answer and cross action to appellant's suit, he claimed that, because the Frees used community funds to purchase the co-owner bonds listed above, he as the heir to the bulk of Mrs. Free's estate was entitled to one-half the bonds, or, as an alternative, to one-half their value. Appellant filed a motion for summary judgment, with supporting affidavits, to which the appellee filed no reply, nor controverting affidavits. Upon a hearing on appellant's motion, the trial court, on November 23, 1959, rendered judgment for the appellant for the title to and possession of said co-owner bonds, but at the same time ordered that appellee, in equity, ought to recover from appellant one-half of the value of the bonds, and fixed a lien on the proceeds thereof to enforce the judgment.

J. W. Free has appealed. Appellant's first three points of error are based upon the contention that, since the purchase of the co-owner United States Savings Bonds constituted a contract which guarantees, among its other provisions, payment to either surviving co-owner of the bonds in the event of the death of the other, and, since there was no pleading or proof that purchase of the bonds was in fraud of the community property rights of Mary Ida Free, the trial court erred in rendering judgment against the appellant for one-half of the value of the bonds and fixing a lien thereon. In this connection it is appellant's prime position that under the record in this cause he is entitled to the rendition of a judgment in his favor for the full title and possession of the bonds in question and all the fruits thereof, free and clear of any and all claims and liens asserted by appellee.

The regulations of the United States Treasury Department which pertain here (Department Circular No. 530, as revised) provide that "If either co-owner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving co-owner will be recognized as the sole and absolute owner of the bond and pay-

ment or reissue, as though the bond were registered in his name alone, will be made only to such survivor * * * ."

A few courts in states other than Texas, notably the Louisiana Supreme Court in Slater v. Culpepper (222 La. 962, 64 S.W. (2) 234, 37 A.L.R. (2) 1216), have held this regulation to be merely a method of payment designed for the convenience of the government; also see the case of In the Matter of the Estate of Bertha Q. Allen, deceased, 343 P. (2) 867, Supreme Court of Washington, which follows the Slater v. Culpepper case, but which also recognizes that the Supreme Court of Texas reached the opposite conclusion in Ricks v. Smith, Tex., 318 S.W. (2) 439, and in the course of its opinion in said cause the Supreme Court of Washington stated:

> *"We are not unmindful of the fact that the Supreme Court of Texas, although badly divided, reached the opposite conclusion in Ricks* v. *Smith, 318 S.W. 2d 439.* However, we prefer and adopt the view of the Supreme Court of Louisiana in Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 237, 37 A. L. R. 2d 1216. * * *"

Appellee relies principally on the Slater v. Culpepper case, supra, the Allen estate case, supra, and the dissenting opinion of Justice Walker in Ricks v. Smith, supra.

The Supreme Court of Texas in Ricks v. Smith, Tex., 318 S.W. (2) 439, divided 6 to 3, with Chief Justice Hickman writing the opinion for the majority. We quote from said majority opinion in part as follows:

> "It cannot be questioned that the opinion of the Court of Civil Appeals follows the rule adopted by a majority of the courts. A number of cases from other jurisdictions are cited in the annotation in 37 A.L.R. 2d 1216 et seq. The annotation is to the Louisiana case of Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 37 A.L.R. 2d 1216, which case declined to give controlling effect to the Treasury regulations incorporated in the bonds, holding that to do so would nullify community property law of that state. While that case is the only

one cited from a State having community property law, we agree with the Court of Civil Appeals that the purchase of the bonds was by a contract which created a property right,—not merely a method of payment for the convenience of the Treasury Department. There is no sanctity of the community property law above that of other types of law. To give supremacy to Federal regulations no more affects community property law than laws of descent and distribution. The solution as to the property rights of the surviving co-owner of "or" bonds rests in contract, and that contract becomes a part of the bonds. The decisions in this jurisdiction cited in the opinion of the Court of Civil Appeals, while not deciding the precise question here presented, are certainly in harmony with the majority rule followed by that court. We, therefore, approve that holding."

The Court of Civil Appeals' opinion in Smith v. Ricks, Tex. Civ. App. 308 S.W. (2) 941, in specifically refusing to follow the Slater v. Culpepper case stated:

"In further support of their contention, appellees strenuously urge upon the Court the reasoning employed in Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 37 A.L.R. 2d 1216; Winsberg v. Winsberg, 220 La. 398, 56 So. 2d 730. Both of these decisions follow the holdings of a minority of the courts (see 37 A.L.R. 2d 1216) to the effect that irrespective of the Treasury regulations, which provide that the co-owner named in a United States Savings Bond, when predeceased by the other co-owner, will be recognized as the sole owner, nevertheless, if the bonds were purchased with community funds, the proceeds thereof remain the community property of the husband and wife under the laws so providing of the State of their residence, and the heirs or legatees of the spouse first dying may proceed in reconvention against the estate of the surviving spouse holding or collecting on the bonds for a one-half interest representing the interest of the spouse first dying.

"The majority of the courts, however, follow the reasoning discussed by the late Associate Justice Smedley in Edds v. Mitchell, 143 Tex. 307, 184 S.W. 2d 823,

829, 158 A.L.R. 470, to the effect that the Federal statutes 'authorizing the Secretary of the Treasury to issue the bonds, subject to such terms and conditions as he may prescribe,' and the Treasury regulations under which they are issued are the valid exercise of the constitutional power to 'borrow Money on the credit of the United States' (article 1 § 8, cl. 2), and that 'no state law can vary the terms of the Federal obligations or derogate from their full enforceability'."

In 37 A.L.R. 2d, p. 1223, it is stated:

"Right of surviving co-owner, generally.

§ 3. Majority view.

(a) Generally.

"The rule followed by a majority of the courts, frequently called the 'majority rule,' with respect to rights in United States savings bonds registered in the names of two individuals in the alternative, upon the death of one of the co-owners, is that the surviving co-owner is vested with the sole ownership in such bonds, at least in the absence of fraud or other inequitable conduct on the part of the survivor."

The dissenting opinion of Justice Walker in Ricks v. Smith, supra, joined in by two other Justices, is heavily relied upon by appellee as supportive of his position in this case. However, the majority opinion in Ricks v. Smith, supra, written by Chief Justice Hickman, was agreed to by five other Justices of the Supreme Court, with the Supreme Court dividing 6 to 3 on the case. This court accepts the majority opinion in Ricks v. Smith, supra, as being controlling and decisive.

There was no pleading in the case at bar that the purchase of the bonds in question was in fraud of the community property rights of Mary Ida Free. The bonds in question were bought with the Free's community funds and were made payable to either Mr. Free or Mrs. Free, in conformity with the U. S. Treasury regulations, and a full

twelve years elapsed between the purchase of the bonds and the death of Mrs. Free, and certainly under this record there was no actual fraud shown on the part of the husband in investing community funds in the bonds. It is our further view that under this record the purchase of the bonds and their subsequent passing to the appellant by reason of the unpredictable prior death of Mrs. Free (and under the contractual provisions of the U. S. Treasury regulations) does not in law amount to a constructive fraud upon the estate of Mrs. Free. Also, if Mr. Free had died first and the bonds had passed to Mrs. Free under the contractual treasury regulations we do not think it could be held that a constructive fraud had been committed against Mr. Free's estate by the purchase of the bonds in question under the record in this case.

This court, being an intermediate appellate court, will follow the majority opinions of the Supreme Court of Texas. After careful consideration of the matter it is our considered judgment that the majority opinion of the Supreme Court of Texas in Ricks v. Smith, supra, is controlling and decisive of this case and requires that the judgment of the trial court be reversed and rendered in favor of the appellant awarding him full title and possession of the bonds in question, and the fruits thereof, free and clear of any and all asserted claims and liens of appellees.

The judgment of the trial court is reversed and judgment is here rendered in favor of appellant for the full title and possession of the bonds in question, and all the fruits thereof, free and clear of any and all claims and liens asserted by appellee.

Reversed and rendered.

WM. J. FANNING
Associate Justice

July 12, 1960

IN THE SUPREME COURT OF TEXAS

No. A-8079

JAMES F. BLAND, Individually and as Independent Executor, *Petitioner*

v.

J. W. FREE, *Respondent*

From Upshur County Sixth District

Per Curiam

The opinion of the Court of Civil Appeals, reported in 337 S.W. 2d 805, followed our holding in the case of Ricks v. Smith, 159 Tex. 280, 318 S.W. 2d 439 (1958).

Our action on this application for writ of error was held in abeyance until the case of Hilley v. Hilley should be decided because that case would determine our holding in this cause. Prior to our action on this application for writ of error we decided the case of Hilley v. Hilley, (Vol. 4, The Texas Supreme Court Journal, p. 213, Jan. 28, 1961) in which the case of Ricks v. Smith was overruled. The decision of the Court of Civil Appeals in the present case is in conflict with our opinion in the Hilley case.

Under the discretion given us by Rule 483, Texas Rules of Civil Procedure, we reverse the judgment of the Court of Civil Appeals in this case and affirm the judgment of the trial court.

March 8, 1961

IN THE SUPREME COURT OF TEXAS
AUSTIN

March 8, 1961

No. A-8079

JAMES P. BLAND

v.

J. W. FREE

From Upshur County, Sixth District

Application of petitioner, James W. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, for writ of error to the Court of Civil Appeals for the Sixth District having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, but no error in the judgment of the District Court, it is therefore *adjudged, ordered* and *decreed* that, under Rule 483, Texas Rules of Civil Procedure, the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and the judgment of the District Court be, and hereby is, affirmed, in acordance with the per curiam opinion herein this day delivered.

It is further ordered that respondent, J. W. Free, and the surety on his appeal bond, The Western Casualty & Supply Co., pay all costs in this cause expended and incurred in this Court and the Court of Civil Appeals; that petitioner, James W. Bland, individually and as Independent Executor of the Estate of Ida Free, deceased, have and recover of and from respondent, J. W. Free, and surety, Western Casualty and Supply Co., the costs by him expended and incurred in said courts, and that this decision be certified to both the Court of Civil Appeals for the Sixth Supreme Judicial District and the District Court of Upshur County, Texas, for observance.

IN THE SUPREME COURT OF TEXAS

No. A-7563

PEARL HILLEY, *Petitioner*

v.

GARLAND HILLEY, *Respondent.*

WALKER, Justice.

This is an action for a declaratory judgment to determine whether corporate stock purchased with community funds and issued in the names of the husband and wife "as joint tenants with right of survivorship and not as tenants in common" constitutes community property or belongs to the wife as her separate estate upon the husband's death. The trial court held that the stock is community property, and the Court of Civil Appeals affirmed. 327 S.W. 2d 467. We affirm the judgment of the Court of Civil Appeals.

Mrs. Pearl Hilley, petitioner, and W. E. Hilley were married in 1920 and lived together as husband and wife until his death in 1956. At the time the stock was purchased, W. E. Hilley instructed the broker in petitioner's presence to have the certificates issued in their joint names and in such manner and form that upon the death of either the securities would belong to the survivor. The certificates as delivered to and accepted by the husband contained the language quoted above. They were thereafter kept in a safety deposit box carried in the joint names of the husband and wife, but the contract with the bank contains no survivorship provision with reference to the box or its contents. Each of the parties had a key to the box and was authorized to enter the same at will. W. E. Hilley, who died intestate, was survived by petitioner and Garland Hilley, respondent. The latter is the son of W. E. Hilley by a former marriage.

Article 2580, Tex. Rev. Civ. Stat. 1925,[1] provided that where two or more persons held an estate jointly the interest of one who died before severance would vest in his heirs or legal representatives and not survive to the other joint owners. It was held in Chandler v. Kountze, Tex. Civ. App., 130 S.W. 2d 327 (wr. ref.), that while the relationship of joint tenancy, including the doctrine of survivorship, was thereby abolished in situations where the same would otherwise have been created by law, the statute did not prevent the grantees in a deed from making an effective agreement among themselves that the property conveyed should pass to and vest in the survivor as at common law. A written survivorship contract covering a joint bank account was also upheld in Adams v. Jones, Tex. Civ. App., 285 S.W. 2d 401 (no writ). When Article 2580 was carried into and became Section 46 of the Probate Code, the language of the earlier statute was preserved with the express proviso that "by an agreement in writing of joint owners of property, the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners, but no such agreement shall be inferred from the mere fact that this property is held in joint ownership." We assume for the purpose of this opinion that in view of the instructions given to the broker by the husband in the wife's presence, the issuance and acceptance of the stock certificates in their names as joint tenants with right of survivorship constitutes a written agreement within the meaning of the statute.

The Chandler and Adams case did not involve community property or a survivorship agreement between husband and wife, but there are a number of Texas decisions which bear directly or indirectly on the question here presented. In Shroff v. Deaton, Tex. Civ. App., 220 S.W. 2d 489 (no writ), community funds were deposited in a savings and loan as-

[1] Except as otherwise indicated all statutes are referred to by the article number under which they appear in Vernon's Annotated Texas Civil Statutes

sociation pursuant to an optional share subscription contract signed by the husband and wife. It provided that the stock was held by the association for their account as joint tenants with right of survivorship, and the trial court also found as a fact that a short time before his death the husband delivered the pass book to the wife and made a valid gift to her of all his interest in the stock. The court of Civil Appeals expressed the view that the survivorship agreement should be enforced in the absence of fraud, undue influence, mistake or other infirmity, but then pointed out that if this conclusion was erroneous the trial court's finding of a valid gift made shortly before the husband's death would still stand as determinative of the whole case.

An agreement in substantially the same form was considered in Reed v. Reed, Tex. Civ. App., 283 S.W. 2d 311 (no writ), and the court concluded that under our Constitution and statutes the husband and wife have no power to convert their community estate into the separate property of the survivor by such a contract. Three years later in Steffens v. Pollard, Tex. Civ. App., 319 S.W. 2d 447 (affirmed on another ground, but now pending on motion for rehearing, Tex., 343 S.W. 2d 234), the same court refused to follow the Reed case and held on the authority of our decision in Ricks v. Smith, Tex., 318 S.W. 2d 439, 440, that building and loan shares purchased with community funds vested in the wife at her husband's death because of the survivorship provision in the certificates.

The Ricks case involved United States Savings Bonds purchased by the husband with community funds and payable to the husband or wife as co-owners. He predeceased her without having cashed the bonds and after her death a controversy arose as to the ownership of the securities. The Treasury regulations applicable to bonds so issued provide that the surviving co-owner shall be recognized as the sole and absolute owner thereof. In affirming the judgment of the Court of Civil Appeals holding that the bonds vested in the wife at her husband's death, this Court said:

"• • • we agree with the Court of Civil Appeals that the purchase of the bonds was by a contract which created a property right,—not merely a method of payment for the convenience of the Treasury Department. There is no sanctity of the community property law above that of other types of law. To give supremacy to Federal regulations no more affects community property law than laws of descent and distribution. The solution as to the property rights of the surviving co-owner of 'or' bonds rests in contract, and that contract becomes a part of the bonds. The decisions in this jurisdiction cited in the opinion of the Court of Civil Appeals, while not deciding the precise question here presented, are certainly in harmony with the majority rule followed by that court. We, therefore, approve that holding."

The power of the husband and wife to transmute their community property into property held by the spouses in joint tenancy with right of survivorship has been recognized in other community property jurisdictions where the question has arisen. See Annotation 30 A.L.R. 2d 1241. As will be pointed out later, we are inclined to the view that the marital partners also have the power in Texas, but the question to be decided here is whether they may accomplish this result by purchasing securities or other property and having the same conveyed or transferred to them as joint tenants with right of survivorship.

Article XVI, Section 15, of the Constitution, and Article 4614 of the statutes define the wife's separate property as that owned or claimed by her before marriage and that acquired afterward by gift, devise or descent. The husband's separate property is defined in similar terms by Article 4613. Article 4619 provides that all property acquired by either the husband or wife during marriage, except that which is the separate property or either, shall be deemed community property. All marital property is thus either separate or community. If acquired before marriage by any method, or after marriage by gift, devise or descent, it

is separate; otherwise it is community. There are only two exceptions. Property purchased with separate funds is separate, Love v. Robertson, 7 Tex. 6, 56 Am. Dec. 41, and community property partitioned in the manner provided in Articles 4624a and 881a-23, becomes separate property.

The stock involved in this case was acquired by purchase during marriage, and by definition became community property unless the survivorship provision inserted in the certificates with the knowledge and consent of the husband and wife converted the same into the latter's separate property upon her husband's death. The parties clearly intended that result, but as pointed out in Kellett v. Trice, 95 Tex. 160, 66 S.W. 51, 54, "the question whether particular property is separate or community must depend upon the existence or nonexistence of the facts, which, by the rules of law, give character to it, and not merely upon the stipulations • • • that it shall belong to one class or the other. Thus, when one spouse passes to the other by gift his or her title to separate property, it could not become the community property of both, because the law declares that property so acquired shall be the separate property of the donee; and a gift by the husband to the wife of his interest in community property would become the separate property of the donee for the same reason. And so property acquired in the name of either spouse during marriage, otherwise than by gift, devise or descent, or in exchange for separate property, would, by force of the statute, be community property. It is true that in the acquisition or afterwards the husband may give to the wife all his interest in the property, and thus, by gift, make it hers; but at last this would be true only because the facts defined in the law exist, and the separate right is derived through a gift, the husband having full power over the community estate." See also Tittle v. Tittle, 148 Tex. 102, 220 S.W. 2d 637. In Cox v. Miller, 54 Tex. 16, it was said that while the husband may make a direct gift of his separate property or the community estate to his wife, the spouses cannot by a mere agree-

ment change the character and nature of the rights and interest in property owned or acquired by them from that prescribed by law.

The survivorship agreement made by petitioner and her husband is not effective as a partition under Article XVI, Section 15, because it is not subscribed and acknowledged by both spouses as required in Article 4624a. It also is clear that the securities did not pass to petitioner by devise or descent, and no interest or right therein was acquired with her separate funds. There is nothing to suggest that Mr. Hilley made a gift *in praesenti* of all his interest in the stock. The parties did not intend that the same should immediately pass to petitioner as her separate property. Instead it was agreed that the securities would be held by the spouses as joint owners while both lived and then vest in the survivor upon the death of either.

If their contract is to be regarded as an agreement that the stock would remain community property as long as both parties lived and then pass to and become the separate property of the survivor, it clearly contravenes Article 4610. Persons intending to marry are there prohibited from making any agreement which would alter the legal order of descent. While the literal wording of the statute applies only to ante-nuptial agreements, the courts have extended its terms to post-nuptial agreements as a matter of public policy. See Weidner v. Crowther, 157 Tex. 240, 301 S.W. 2d 621, and authorities there cited. Even if we disregard Article 4610 or hold that its provisions do not apply to survivorship agreements, the title which petitioner asserts had its inception in the contract she made with her husband and is therefore deemed to have been acquired during marriage for the purpose of determining its separate or community status. Golden v. Alexander, 141 Tex. 134, 171 S.W. 2d 328; Creamer v. Briscoe, 101 Tex. 490, 109 S.W. 911, 17 L.R.A., N.S., 154, 130 Am. St. Rep. 869; MacRae v. MacRae, Tex. Civ. App., 144 SW. 2d 320 (wr. ref.). If

petitioner now owns the stock as her separate property, it must be on the theory that when the same was purchased she acquired as a gift from her husband the right or interest therein which ripened into absolute ownership upon his death.

A gift is a transfer of property made voluntarily and gratuitiously. When an *inter vivos* transfer is made to either or both of the spouses during marriage, the separate or community character of the property is determined by looking to the consideration given in exchange for it. Any right, title or interest acquired for a valuable consideration paid out of the community necessarily becomes community property, and this is so whether the transfer be made by some third person or by one of the marital partners to the other.

The parties here did not merely agree that petitioner would own the securities in event she survived; it was also stipulated that the stock would vest in the husband if petitioner died first. Prior to the making of this agreement, each spouse owned a community one-half interest in the money used to purchase the stock. If the agreement had not been made, each would have acquired a similar interest in the stock with all of the rights and powers incident thereto. Each would have had the power to dispose of his or her interest by will or to permit the same to pass and vest in accordance with the statutes of descent and distribution. Under the terms of their contract if the same is effective, each relinquished at least some of the legal incidents of community ownership and received in lieu thereof the right to become absolute owner in the event he or she survived the other contracting party. If they became joint tenants, it is by virtue of a transaction in which each surrendered a community interest in exchange for the interest of a joint tenant. Aside from the fact that their life expectancies might not be the same, the right or interest acquired by the husband is no less valuable than that received by the

wife. The detriment to the husband is no greater than that suffered by the wife. There is no gift then but an attempted transfer of a survivorship right or interest from each spouse to the other for a valuable consideration. Since the consideration paid by each is derived from the community estate, the right or interest which each expected to acquire necessarily remains part of that estate.

In this respect their agreement is not materially different from the deed involved in Pevehouse v. Lubbock National Bank, Tex. Civ. App., 79 S.W. 2d 1107, 1108 (no writ). Community land was conveyed by the husband to his wife in consideration of her relinquishing all rights to other community property. It was held that the land which the deed purported to convey remained the community property of the parties, and the court said:

> "This instrument does not evidence a gift by the husband to the wife, since 'gift' means a voluntary transfer of property by one party to another without any consideration. If there is a consideration for the transfer, the rights of the parties to the transaction are contractual and determined by the law of contracts. Kearse v. Kearse et al., Tex. Com. App., 276 S.W. 690, 691; Brito v. Slack, Tex. Civ. App., 25 S.W. 2d 881. • • • This instrument constituted an agreement between the husband and wife to divide or partition their community property and create therefrom a separate estate for each, which, so long as they continue their marital relation, is not authorized by law."

Although supremacy of Federal regulations was mentioned in the majority opinion, the holding of the Ricks case is based on the premise that a husband who uses community funds to purchase U. S. Savings Bonds and has the same issued in the names of the spouses as co-owners thereby makes a contract with the government for the benefit of a third party, the wife. It stems from Edds v. Mitchell, 143 Tex. 307, 184 S.W. 2d 823, 158 A.L.R. 470, where "p. o. d." bonds purchased by a life tenant with power of disposition

were likened to a policy of life insurance. The opinion in the Edds case states that a life insurance policy for the benefit of another is perhaps the best illustration of a contract for the benefit of a donee beneficiary, and that the situation of the parties to the bonds then under consideration was substantially the same as that of the parties to an insurance policy.

After further consideration of the question, we are convinced that the Ricks decision cannot be reconciled with the provisions of our Constitution and statutes. The "contract" which a purchaser of bonds makes with the government does not simply provide that the securities shall become the property of the other co-owner at the purchaser's death. It stipulates that if either co-owner dies, the surviving co-owner shall be recognized as sole and absolute owner. This is nothing more than a survivorship agreement although the contracting parties are usually the purchaser and the government rather than the two co-owners. Under the provisions of the Probate Code, the interest of a joint owner who dies may be made to survive only by agreement of the joint owners in writing. As applied to community property, the statute means that the interest of one spouse cannot survive to the other except by contract of the husband and wife. Such an agreement when made is for the mutual benefit of the contracting parties, and there is no semblance of a gift even though some third party may also agree to recognize the survivor as absolute owner. The fact that a third person is involved in the transaction, either as grantor, transferor, borrower, issuing corporation, depository, or otherwise, is thus of no legal consequence. Dealings with a third party cannot give rise to a survivorship interest unless the joint owners have the power to and do make an effective written contract so providing. There is no basis for saying that the spouses have even attempted to make such an agreement when one buys government bonds without the knowledge or consent of the other.

It is clear that the Federal regulations do not override our local laws in matters of purely private ownership where the interests of the United States are not involved. Bank of America National Trust & Savings Ass'n v. Parnell, 352 U.S. 29, 77 S. Ct. 119, 1 L.Ed. 2d 93. We might continue to treat "or" bonds purchased with community funds as though they were legally analogous to a life insurance contract and look to the insurance decisions for precedents in determining the ownership of such securities after the death of one co-owner. This or some equally unrealistic approach seems to be the only alternative to overruling the Ricks case if title is to vest in the husband when the wife dies first. Before Article 23 was amended to provide that the word "property" as used in the statutes would include life insurance policies and the effects thereof, it was generally held that in the absence of fraud the proceeds of a policy on the life of one spouse became the property of the designated beneficiary although the premiums were paid with community funds. This was so even where the policy insured the wife's life in favor of her husband. The courts reasoned that an insurance contract is not property, and that the policy proceeds paid to the husband after the death of the insured wife were not acquired during marriage and therefore became his separate property. It was said that the husband as manager of the community was authorized to purchase the contract with community funds and that there should be no interference with his statutory right of control unless it was exercised in fraud of the wife's rights. See Martin v. McAllister, 94 Tex. 567, 63 S.W. 624, 56 L.R.A. 585; Volunteer State Life Ins. Co. v. Hardin, 145 Tex. 245, 197 S.W. 2d 105, 168 A.L.R. 337; Warthan v. Haynes, 155 Tex. 413, 288 S.W. 2d 481. On the other hand the cash surrender value of a policy purchased with community funds was regarded as community property. Womack v. Womack, 141 Tex. 299, 172 S.W. 2d 307. And the policy proceeds were treated as community property for inheritance tax purposes. Blackmon v. Hansen, 140 Tex. 536, 169 S.W. 2d 962.

The decided cases demonstrate the difficulties that were encountered once the courts refused to recognize the property aspects of life insurance. There is no material difference between "or" bonds and other types of property, and any departure from established principles of community property law in dealing with the same will almost certainly lead to confusion and uncertainty as well as inconsistent or undesirable results in particular cases. The insurance decisions suggest that the wife's estate can be protected when she has been defrauded by her husband, but it will usually be difficult or impossible to establish actual fraud and we do not anticipate that constructive fraud will be defined with such clarity as to provide a satisfactory standard that will insure even reasonably fair treatment of the marital partners and their estates in the various situations that may arise. These considerations lead us to the conclusion that the Ricks case should be overruled, and we will not follow the same where "or" bonds are purchased with community funds and issued in the names of the spouses as co-owners. See Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 37 A.L.R. 2d 1216; In re Allen's Estate, 54 Wash. 2d 616, 343 P. 2d 867. This does not require that the holdings of Chamberlain v. Robinson, Tex. Civ. App., 305 S.W. 2d 817 (wr. ref.), or McFarland v. Phillips, Tex. Civ. App, 253 SW. 2d 953 (wr. ref. n. r. e.), be disturbed. Community property apparently was not involved in those cases, and there seems to be no legal impediment to recognition of a contract for the benefit of a third party when the bonds are acquired with the purchaser's separate funds The case in which bonds are purchased by one spouse with community funds and issued in his or her name and that of some third person as co-owners will be decided when it arises.

We do not think the Legislature in amending Article 2580 intended to modify other statutes and provide that separate ownership might result from a transaction which does not meet the requirements of Articles 4613, 4614, 4619, 4624a and 881a-23. In the first place, any such attempt could not

be effectual in so far as the wife is concerned. Under the Constitution, property which she acquires during marriage in any manner other than by gift, devise, descent, purchased with separate funds, or partition as authorized by Articles 4624a and 881a-23 does not and cannot be made to constitute her separate property. Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799. In the second place and while we do not attempt to decide the question here, it seems that our Constitution and statutes already provide a method whereby the spouses may arrange for property which once constituted part of their community estate to vest in the survivor if the necessary formalities are observed. Community property may be partitioned in the manner provided in Article 4624a, and the portion set apart to each spouse thereupon becomes his or her separate estate. Articles 4614 provides that the wife, if she is at least twenty-one years of age and elects in the manner set out therein, shall have the sole management, control and disposition of her separate property, and in connection therewith may contract without the joinder of her husband. If the wife thus acquires power to contract with the husband regarding her separate estate, there apparently is no legal reason for saying that they cannot make an effective survivorship agreement covering property separately owned by either or both. Under such circumstances the survivorship right or interest acquired by each at the time of making the contract would be by gift or purchase for a consideration paid out of separate property.

An amicus curiae brief suggests that the parties should be presumed to have intended to take any intervening steps that might be necessary to accomplish the result they desired. We are urged to say that Mr. Hilley first gave the community funds to petitioner and that the latter then used her separate property thus acquired to purchase the stock and create a joint tenancy with her husband. This argument, which has already been answered by the opinion in

Kellett v. Trice, supra, implicitly recognizes that the agreement in the present case can be upheld only by resorting to legal fiction. A transaction in which each party receives something of value for that which is relinquished has none of the earmarks of and cannot be given the same legal effect as successive and unrelated gifts. We agree with the Court of Civil Appeals that instead of becoming petitioner's separate property upon her husband's death, the stock passed and vested in accordance with the laws of descent and distribution applicable to community property. The question whether an issuing corporation will be protected when it deals with the survivor without notice that the stock was purchased with community funds is not presented or decided.

The judgment of the Court of Civil Appeals is affirmed.

Griffin, Culver and Norvell, JJ., dissenting.

Steakley, J., not sitting.

Norvell, Justice (dissenting).

I agree with the Court that as a logical proposition Ricks v. Smith, Tex., 318 S.W. 2d 439, 440, should be overruled if the judgment of the Court of Civil Appeals is to be affirmed.

In the Ricks case this Court held that "the purchase of the (United States Savings) bonds was by a contract which created a property right,—not merely a method of payment for the convenience of the Treasury Department. There is no sanctity of the community property law above that of other types of law. To give supremacy to Federal regulations no more affects community property law than laws of descent and distribution. The solution as to the property rights of the surviving co-owner of 'or' bonds rests in contract, and that contract becomes a part of the bonds."

In the present case the securities in dispute (mutual fund certificates) were issued to "W. E. Hilley and Pearl Hilley

as joint tenants with full right of survivorship and not as tenants in common."

However, instead of overruling the Ricks case, I would reverse the judgment of the Court of Civil Appeals as being contrary thereto.

When writing in opposition to a decision which overrules a case which is considered sound there is not much to be said other than that one regrets the departure of the departed. Ricks v. Smith speaks for itself. In my opinion it was supported in principle by Edds v. Mitchell, 143 Tex. 307, 184 S.W. 2d 823, 158 A.L.R. 470; Shroff v. Deaton, Tex. Civ. App., 220 S.W. 2d 489, no wr. hist., and McFarland v. Phillips, Tex. Civ. App., 253 S.W. 2d 953, wr ref. n. r. e, and is in accord with the weight of American authority on the point. In the annotation following the report of Slater v. Culpepper, 222 La. 962, 64 So. 2d 234 in the American Law Reports (37 A.L.R. 2d 1216) it is said that:

> "The rule followed by a majority of the courts, frequently called the 'majority rule', with respect to rights in United States savings bonds registered in the names of two individuals in the alternative, upon the death of one of the co-owners, is that the surviving co-owner is vested with the sole ownership in such bonds, at least in the absence of fraud or other inequitable conduct on the part of the survivor." 37 A.L.R. 2d 223.

Texas is listed as one of the states following the majority rule along with California, another community property state.

One may well rest his argument upon the authorities mentioned along with the observation suggested in one of the briefs relating to the question before us:

Under modern social conditions there now exists a true family community wherein the wife upon the death of the husband succeeds to the head of the family and is conceded the competency to handle the family finances. The holding

of securities under the contractual relationship here involved offers a means for the modern family to pool the husband's and wife's resources and keep them in a flexible state for use during the marriage and at the same time providing for unfettered passage of title of the whole to the surviving head of the family unit. There is no public policy upon which such an arrangement could infringe. In fact, public policy should be to foster such procedures.

Mr. and Mrs. Hilley purchased shares in the issuing corporations which carried with them certain contract rights which accrued to them as certificate holders. The rights which they acquired by contract and purchase were similar to those held by owners of the common law estate of joint tenancy, notably the right of survivorship. While at common law agreements attempting to "alter the legal orders of descent" were not sanctioned, Protzel v. Schroeder, 83 Tex. 684, 19 S.W. 292, 294, it was never considered that agreements giving rise to joint tenancies were comprehended by the rule. The right of survivorship arose with the purchase and acquisition of the title, and such expectancies as the heirs of either of the parties may have had were deflected, so to speak, by the contractual consequences incident to and a part of the property rights acquired. While the contractual interest to the property acquired was not a technical common law estate, the right of survivorship was clearly expressed and that is the matter with which we are here concerned. The right of the survivor to take the property upon dissolution of the marriage by death had its genesis in and arose from the contract of purchase. To receive and accept property under such arrangement is no more violative of the community property scheme of things than the purchase of a life estate with community funds would be. For property to be community it is not essential that it be held in fee simple. It is not required that the interest of the person who dies first should pass to his or her heirs, absent a valid testamentary provision. The clear import of the Ricks case supports

these statements. I believe them to be sound and in accordance with an enlightened policy which in the absence of fraud would allow persons to freely contract and choose the species of property which they wish to possess. Accordingly, I dissent from the Court's action in overruling Ricks v. Smith.

I am further in disagreement with the Court upon its holding that an agreement between husband and wife complying with the provisions of Article 46 of the Probate Code is insufficient as a basis for a right of survivorship in property purchased with community funds.

In Chandler v. Kountze, Tex.Civ.App., 130 S.W.2d 327, 328, wr. ref., it appeared that Texas Land & Cattle Company conveyed various tracts of land to Charles T. Kountze and Luther L. Kountze "as joint tenants, with all the rights of such tenants in common law including the right of survivorship."

The Court of Civil Appeals held that:

> "While the wording of Article 2580 indicates a legislative intent to abolish the relationship of joint tenancy where it would otherwise have been created by law, including the common-law doctrine of survivorship, there is nothing in the subject matter of the act which would, in our opinion, justify the presumption that the legislature intended to thereby prevent the parties to a contract, a will, or a deed of conveyance, from providing among themselves that the property in question should pass to and vest in the survivor as at common law."

After a rather exhaustive consideration of the American authorities, the Court concluded that the provisions relating to survivorship were not void as being in contravention of the statute, "but that such provisions are valid and enforcible as the clearly expressed intention and desires of the contracting parties."

This Court refused a writ of error in the case and its

soundness, as applied to the factual situation then before the Court, has never been questioned.

The substance of Article 2580 now appears in Article 46 of the Probate Code, viz.:

> "Where two or more persons hold an estate, real, personal, or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owner or joint owners, but shall descend to, and be vested in, the heirs or legal representatives of such deceased joint owner in the same manner as if his interest had been severed and ascertained. *Provided, however, that by an agreement in writing of joint owners of property, the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership.*"

The proviso above italicized was added in 1955 at the time of the adoption of the Probate Code.

In adopting this proviso, the Legislature undoubtedly had in mind the decision in Chandler v. Kountze and legislated in regard thereto. The wording of the proviso is that joint owners may provide by an agreement in writing that the interest of any joint owner who dies may be made to survive to the surviving joint owner. It is not here disputed that at the time of the inception of title, there was an agreement providing that the mutual fund shares involved should be held subject to the "full right of survivorship" of the surviving joint owner. It seems therefore that we have direct statutory authority for the issuance of the form of security involved in this case.

It is the position of the Court that while the holding of Chandler v. Kountze and the proviso of the statute above quoted may apply to properties purchased by husband and wife using monies from their separate estates, they cannot be applied to properties purchased with community funds. It is contended that a husband and wife must first partition

community property, as permitted by Article 16, § 15 of the Constitution and Article 4624a, Vernon's Ann.Tex.Stats., before they may purchase securities of the type here involved, namely, those carrying a valid contractual provision for the right of survivorship.

The Court's holding seems to be that the use of community funds to purchase survivorship contracts in some way interfere with the provisions of Article 4610, Vernon's Ann.Tex.Stats., which expressly proscribes pre-nuptial agreements altering the legal orders of descent and by implication render invalid post-nuptial agreements which would have that effect.

Despite the provisions of Article 4610, this Court has held that mutual wills based on *contract* are enforceable in this State. In Weidner v. Crowther, 157 Tex. 240, 301 S.W.2d 621, 625, this Court said:

> "The mutual will of Hugo and Sophie Weidner was not rendered invalid by Article 4610. Of equal dignity with Article 4610 is the statute which permits every person, competent under the provisions thereof, to dispose of his property by will, Texas Probate Code, sec. 57, V.A.T.S. Article 8281, Revised Civil Statutes of Texas 1925, repealed by adoption of the Probate Code."

See, also, Graser v. Graser, 147 Tex. 404, 215 S.W.2d 867.

Can it not be said with equal logic that a written agreement providing for contractual survivorship with reference to property is not rendered invalid by Article 4610? Of equal dignity with Article 4610 is the statute which permits joint owners of property by agreement in writing to provide that the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners. I believe it can and would so construe the statutory enactments involved. On this basis as well as the rule of Ricks v. Smith, survivorship agreements should be upheld.

For the reasons set forth, I respectfully dissent from the order affirming the judgment of the Court of Civil Appeals.

GRIFFIN and CULVER, JJ., join in this opinion.

January 25, 1961.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 205

J. W. FREE, *Petitioner*

v.

JAMES F. BLAND, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Pursuant to Rule 42(4) of the Rules of this Court, the Solicitor General, on behalf of the United States, files this memorandum as *amicus curiae* and urges that the petition for a writ of certiorari in this case be granted.

Petitioner brought the present action after the death of his wife to determine the ownership of certain series "E" and "F" United States savings bonds purchased with community property during the life of his wife and registered in the co-ownership ("or") form in his and his wife's name. Although Treasury Regulations

provide that "No judicial determination will be recognized which * * * would defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner" 31 C.F.R. § 315.20, the Supreme Court of Texas considered state law controlling and ordered judgment for the executor of the wife's estate in the amount of one-half the value of the bonds at the same time placing a lien on the bonds to secure payment.

The United States believes, for three reasons, that the petition for certiorari should be granted.

First, the decision of the Supreme Court of Texas is in conflict with the decisions of the highest courts of a substantial number of states on the question of the applicability of state or federal law, and the matter can be resolved only by this Court. See Petition, pp. 7-9. Furthermore, the decision below conflicts in principle with *Wissner* v. *Wissner*, 338 U.S. 655, which held that a widow could not claim one-half of the proceeds of a National Service Life Insurance policy on the basis of California community property law since she had not been named as a beneficiary pursuant to the applicable federal statute (38 U.S.C. (1952 ed.) 802(g), now 38 U.S.C. 716).

Second, the question presented is of substantial importance to the multitude of private holders of United States Bonds, as well as to the United States government in the exercise of its borrowing power. There are presently outstanding over $40 billion worth of savings bonds in a form providing a right of survivorship such as that involved in the present case—*i.e.*, in either the "coowner" or "beneficiary" form of registration, 31 C.F.R. § 315.7

(a)(2) or (3). It is reasonable to assume that a large proportion of these bonds were purchased specifically to obtain the survivorship benefits which the Treasury Department has stated were created by these forms of registration.

Third, the decision of the Supreme Court of Texas erroneously denies effect to duly authorized Treasury Department Regulations and improperly disregards the position with regard to the survivorship provisions to which the Treasury Department has adhered for the past twenty-five years.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1961.

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No. 205

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J. W. FREE,

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the estate of a deceased wife may have a claim for reimbursement or reconvention against the estate of the surviving husband under the community property laws of Texas, where the husband has used his community funds to purchase United States savings bonds in the names of himself "or" his wife without her knowledge or consent, so that upon her death the bonds become his property as owner under Treasury Regulations.

STATEMENT

During their marriage, J. W. Free purchased U. S. Savings bonds with community funds of himself and his wife, without her knowledge or consent, in the names of himself "or" his wife. Thereafter, Mrs. Free died and Respondent Bland duly qualified as her executor. He was also named sole legatee under her will.

Petitioner Free brought suit for a declaratory judgment as to all rights concerning the bonds. Respondent filed a cross-action asserting that he owned a one-half interest in the bonds or, in the alternative, that he was entitled to a money judgment against Petitioner for reimbursement or reconvention to the wife's half of the community because of the purchase of the bonds with community funds.

The District Court did not sustain Respondent's claim of the ownership of a one-half interest in the bonds, but on the other hand rendered judgment for Petitioner Free, "adjudging him to be the owner of the U. S. Government Bonds sued for herein"; it was specifically ordered, adjudged, and decreed "that the Plaintiff, J. W. Free, do have and recover of and from the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, judgment for the title to and possession of the U. S. Government Bonds." However, the District Court did go on to render a money judgment in favor of Respondent for a sum equal to half the money value of the bonds in repayment or reconvention to the wife's half of the community estate because of the use of the community funds for the purchase of the bonds.

The intermediate appellate court, the Court of Civil Appeals, affirmed the judgment of the trial court declaring Petitioner Free to be the owner of the bonds and awarding the title and possession to him, but reversed the money judgment awarded to Respondent against Petitioner.

The Supreme Court of Texas reversed the latter portion of the judgment of the Court of Civil Appeals, and reinstated and affirmed the entire judgment of the trial court, the awarding of title and possession of the bonds to Petitioner Free and the awarding of a money judgment to Respondent Bland against Petitioner for one-half their money value.

The judgment of the District Court, as affirmed by the Supreme Court of Texas, was in accordance with the alternative pleadings of constructive fraud asserted by Respondent in his cross-action as follows:

> "Pleading in the alternative, Cross Plaintiff says that should he be mistaken in his allegations that he is the owner of a one-half interest in said bonds, together with interest thereon, then he says that said bonds, having been purchased by the said J. W. Free without the knowledge or consent of his then wife, Ida Free, with community funds, same having been acquired by J. W. Free and Ida Free, during the time they lived together as husband and wife, and as the result of their joint labors, depleted the community estate and funds of the said J. W. Free to the extent of the purchase price of the said bonds, and that by reason thereof, and the facts hereinabove alleged, the community estate of the said J. W. Free and Ida Free should be reimbursed in the event J. W. Free is decreed to be the owner of said bonds, to the extent of one-half (½) of the community funds used by the said J. W. Free in the purchase of said bonds."

We do not agree that any federal question was raised by Petitioner in the proceedings in the state courts, and particularly none is raised in the pleadings in the District Court upon which all subsequent proceedings were necessarily based.

ARGUMENT

The present case does not warrant intervention by the Supreme Court of the United States on certiorari. The constitutional powers of the United States are not challenged or endangered, and indeed no substantial federal question is presented, nor is the judgment here in conflict with the cases cited by Petitioner.

The courts of Texas here have determined the ownership and right to possession of the bonds in full accord with the Treasury Regulations and gave judgment for the title to and possession of the bonds to Petitioner Free, the surviving co-owner. The right of reimbursement of the community for the use of community funds without the knowledge or consent of the wife is clearly a matter of local law which does not affect and should not concern the Treasury Department, even if its regulations be regarded as determinative of the property rights of ownership as well as the Treasury Department's recognition of ownership and payment of proceeds.

It may well be doubted that the Treasury Regulations seek to establish control over the rights between estates of husband and wife for reimbursement or adjustment for the use of funds belonging to both. Indeed the wording of the Regu-

lations is in terms of recognition by the Treasury Department. Thus it is stated in 31 C.F.R., Sec. 315.5, that the form of registration "will be considered as conclusive" by the Department, that it will treat the ownership and interest to be as shown. Again the provision in Sec. 315.20 is that no judicial determination "will be recognized" by the Department that would defeat the right of survivorship. Again in Sec. 315.61 it is stated that the survivor "will be recognized" as a sole and absolute owner, immediately going on to say: "Thereafter payment or reissue will be made as though the bond were registered in the name of the survivor alone."

Certainly when title, ownership, and right to possession are recognized and held to be in the survivor, the mere allowing by the state court under state community property law of a claim for reimbursement of the community for community funds used in the purchase by the husband, without the consent and knowledge of the wife, does not tend to destroy or even hamper the borrowing power of the government of the United States. It is merely a matter of accounting between the private interests of the community partners for funds expended.

There is no clash here between the applicability of state and federal law, and there is no conflict between this decision and the cases cited by Petitioner. Those cases deal merely with the recognition of ownership, and the judgment here is entirely in accord with them in recognizing title and the right to possession in the survivor and awarding the same to the survivor. Those cases do not deal with the right of reconvention or reimbursement to the wife's community interest for

her half of the community funds used in the purchase. The judgment here is not based upon what the Petitioner terms the "mere convenience of the United States" interpretation of Treasury Regulations, but is entirely consistent with regarding those regulations as controlling the title and ownership and merely finds that a debt arises under the community property law of Texas in the way of a right to reimbursement for the use of the wife's half of their community funds, as part of the accounting between the community interests.

Illustrative of the fact that recognition of a right of reimbursement, a constructive or resulting trust, or an equitable lien is something apart from and not in conflict with recognition of absolute title in a surviving co-owner is the 1960 case of *Levites v. Levites, 169 N. E. 2d 574*. Even in this non-community property state of Illinois, which further had a state statute conferring absolute title on the survivor of co-owners, it was recognized that there was no conflict between absolute title on one hand and the possibility of a constructive trust or other claim on the other hand:

> "Notwithstanding the sweeping effect of the federal regulations and Section 2 of the Illinois Joint Rights and Obligations Act which confer absolute title to the bonds to surviving co-owners or death beneficiaries, it is evident that when cases with special facts are presented a constructive or resulting trust may be impressed against the bonds, such as where a thief steals a person's money and purchases bonds and they can be traced, where bonds are purchased by one spouse with the joint funds of both and the purchaser wrongfully names himself and other persons as co-owners, or where one spouse uses his funds to purchase bonds and places them in the name of himself and others as co-owners in violation of an agreement to make joint and reciprocal wills."

Another pertinent 1960 case is *In Re Chase's Estate, 348 P. 2d 473*, where the court states:

> "The treasury regulations providing for the ownership of the title of United States savings bonds in the surviving co-owner, will not preclude the courts from permitting others to pursue the proceeds, and the court will not hesitate to impose a constructive or resulting trust on the proceeds in order to achieve a fair result in cases of fraud or inequitable conduct. Anderson v. Bendson, D. C. Neb. 117 F. Supp. 765; Chase v. Leiter, 96 Cal. App. 2d 439, 215 P. 2d 756; Olsen v. Olsen, 189 Misc. 1046, 70 N. Y. S. 2d 838; Katz v. Driscoll, 86 Cal. App. 2d 313, 194 P. 2d 822; In Re Hendricksen's Estate, 156 Neb. 463, 56 N. W. 2d 711; In Re Haas' Estate, 10 N. J. Super. 581, 77 A. 2d 523."

The opinion recognizes the majority view that title vests in the surviving co-owner but goes on to point out that this does not prevent the existence of equitable claims and declares:

> "Our exhaustive review of the authorities leads us to the belief that while the treasury regulations provide a convenient method of determining ownership of the title to the bonds, those regulations are not intended to determine absolutely the equitable title to the proceeds thereof; accordingly the surviving co-owner upon the death of the other registered co-owner named on the face of the bond, becomes the absolute owner of the legal title to the bond, and under the said treasury regulations the United States will recognize only the surviving owner to whom, under the contract evidenced by the bond, it is obligated to make payment. Particularly, does this follow in the light of 31 C.F.R. § 315.15 which provides that the registered form of the bond, which must express actual ownership thereof, will be considered as conclusive of such ownership, the exceptions, in such section of the regulations referred to, not having application herein."

A very pertinent case is *In Re Schubert, 63 NYS 2d 27*, where partnership funds were used to purchase U. S. Savings bonds in the names of the two partners as co-owners. It was held that upon the death of one of the partners, the bonds in the possession of the representative of his estate should be delivered up to the surviving partner, as the surviving co-owner; the court went on to declare, however, that if it were true that a co-partnership existed between the co-owners and that the bonds were purchased by partnership funds and belonged to the co-partnership, their value would doubtless be taken into account in an action for an accounting pending in another court. There is of course a strong analogy between a partnership and the community of husband and wife in a community property state, and what the judgment actually does here is merely to take into account the use of community funds in the purchase of the bonds in an accounting between the respective community interests of the spouses.

In *Moore v. Brodrick, 123 F. S. 108, affirmed 226 F. 2d 105*, the federal court held that in the case of registration of U. S. savings bonds in the names of the decedent and his daughter as co-owners, "The contract between the Government and the purchaser of government bonds fixes legal title to the bonds for the purpose of protecting the Government against suits involving title but does not and should not affect other legal rights of third parties or change settled rules of law not necessary to effectuate its purpose." It further commented: "If the father had purchased the bonds with traceable stolen funds, would it be said that the contract and regu-

lations fixing title in the daughter prevented recovery from her by the owner of the funds?" It is noteworthy that the opinion cites and does not consider itself contrary to *Leman v. Foulston, 219 P. 2d 388*, one of the cases Petitioner claims to be in conflict with the present decision.

Silverman v. McGinnes, 259 F. 2d 731, recognizes that the Treasury Regulations have the force of law and that their language is broad, then goes on to say, "But the question to be faced is whether these regulations include not only the rights of the holder of the bonds as against his Government, the debtor, but also whether they determine the rights of individual citizens arising against each other out of transactions with these government bonds." After citing various state cases, it continues:

> "We think the distinction established in these state cases and others does not rest on fraud, although fraud was present in some of them. The point is that with regard to payment by the issuer, the United States Government, the provisions of the contract including the regulations, govern. But the regulations do not apply to individual rights of persons who under the state law of property have become equitably entitled to the proceeds."

Anderson v. Benson, 117 F. S. 765, holds that while under the Treasury Regulations the form of registration of bonds is conclusive of ownership, nevertheless a claim against the proceeds may be recognized without violating such regulations. The court states that it "is not in a position to, or would it, order the parties to request the United States to do other than what it agreed to do under the provisions of its contract, the terms of which are expressed in the bonds, and the stat-

utes and regulations pursuant to which they were issued. However, the Government satisfies its obligation by paying the proceeds in accordance with the terms of its contract to the named beneficiary. There is nothing in the law or regulations which prevent this Court from declaring a resulting trust in the proceeds of the bonds in order to prevent the perpetration of a fraud."

The only cases which deal with the right of reimbursement for the use of community funds, rather than ownership and the right to possession of the bonds, are in accordance with the judgment here. Such a case is *Slater v. Culpepper, 64 So. 2d 234;* there as here judgment was affirmed which recognized and decreed that the survivor was the owner of the bonds but also decreed on the reconventional demand that there be recovery of one-half of their value in reimbursement for the use of the community funds.

Petitioner declares that there is no question of actual or constructive fraud because the Court of Civil Appeals said so. However, that court was reversed by the Supreme Court of Texas, and it is apparent that the idea of constructive fraud was a consideration to it, and Respondent in the state proceeding expressly raised and pressed the contention of constructive fraud. Thus the very Application for Writ of Error states: "Where the husband purchased the bonds, and dies first, and the wife then obtains the full benefit of the transaction, then no question of fraud, either real or constructive, could arise on the part of the wife toward the husband. But in a case such as this, while Petitioner was not in a position

to even allege much less prove actual fraud, a constructive fraud had actually been perpetrated upon her". The opinion by Justice Walker in the *Hilley* case, particularly in the light of his dissent in *Ricks v. Smith*, show a concern with the idea of constructive fraud in the situation where the wife dies first, and of course this particularly arises in a situation, where, as here, the wife had no knowledge or consent to the use of the community funds. Respondent's pleadings stated such facts forming the basis of constructive fraud.

As this Honorable Supreme Court of the United States said in *Bank of America National Trust and Savings Association v. First National Bank in Indiana, 352 U. S. 29, 1 L. Ed. 2d 93:*

> "Securities issued by the Government generate immediate interests of the Government. These were dealt with in Clearfield Trust and in National Metropolitan Bank v. United States, 323 U. S. 454, 89 L. Ed. 383, 65 S. Ct. 354. But they also radiate interests in transactions between private parties. The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern."

The Supreme Court of Texas did not consider state law controlling over federal law, but rather found no conflict between them, and indeed, there is none. Moreover, the re-

stricted question here is not one which would be important to all the multitude of owners of United States bonds nor even all those with the particular form of registration used here, or even all of those with that form of registration in community property states. It arises only when such bonds are purchased by the husband with community funds, without the knowledge or consent of the wife, in a community property state, with this form of registration, where the wife dies first, and where the local law gives a right of reimbursement.

The decision of the Supreme Court of Texas does not deny effect to the Treasury Regulations but enforces them fully, awarding title, ownership, and the right to possession to Petitioner. The Treasury Department has no proper concern with the accounting between community interests for the funds which happen to have gone into the purchase of bonds, nor does such accounting present any federal question.

It is therefore respectfully submitted that this case is not a proper one for intervention by certiorari on the part of this Court, and that Writ of Certiorari should be denied.

Dated this ..... day of ....., 1961.

.....

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APPEARANCE AND CERTIFICATE OF SERVICE

I, Royal H. Brin, Jr. hereby request the Clerk to enter my appearance as counsel for Respondent, and as one of the attorneys for Respondent and a member of the Bar of the Supreme Court of the United States, I hereby certify that on the day of , 1961, I served true and correct copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari upon Petitioner by depositing the same in the United States Post Office with first class postage, prepaid and addressed to Gerhard A. Gesell, 701 Union Trust Building, Washington 5, D. C. and Edwin M. Fulton, Box 500, Gilmer, Texas, attorneys for Petitioner.

.....

Attorney for Respondent

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Supreme Court of the United States

OCTOBER TERM, 1961

J. W. FREE, *Petitioner,*

v.

JAMES F. BLAND, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR PETITIONER

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December 22, 1961.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 205

J. W. FREE, *Petitioner,*

v.

JAMES F. BLAND, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR PETITIONER

This case is before the Court on writ of certiorari (368 U. S. 811) to review a judgment of the Supreme Court of Texas, which refused to give effect to a regulation of the Secretary of the Treasury [31 C.F.R. § 315.61] that upon the death of one coowner of certain United States Savings Bonds, "the survivor will be recognized as the sole and absolute owner", holding that the regulation did not apply in a situation in which such Savings Bonds were purchased with the community property of the two coowners. The Supreme Court of Texas rested its determination solely upon another decision handed down while this case was pending for decision in that court [*Hilley* v. *Hilley*, 161 Tex. 569, 342 S.W. 2d 565 (1961), Appendix B

to Petition for Certiorari, p. 13a], in which it specifically overruled a prior decision upholding the applicability of the federal regulations to this situation [*Ricks* v. *Smith*, 159 Tex. 280, 318 S.W. 2d 439 (1958)].

OPINIONS BELOW

The District Court of Upshur County, Texas, rendered no opinion. Its judgment appears in the Record at p. 28. The opinions of the Texas Court of Civil Appeals (R. 31) and of the Supreme Court of Texas (R. 53) are reported at 337 S.W. 2d 805 and 344 S.W. 2d 435, respectively. The judgment of the Supreme Court of Texas appears in the Record at p. 54. The opinion of that Court in *Hilley* v. *Hilley*, which was held by the court to control the instant case, is reported at 161 Tex. 569, 342 S.W. 2d 565, and appears in Appendix B to the Petition for Certiorari in this Court at pp. 13a *et seq.* thereof.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on March 8, 1961 (R. 54). A timely Petition for Rehearing filed by Petitioner was denied by that court on April 5, 1961 (R. 58). On July 5, 1961, a Petition for Certiorari was filed in this Court to review this decision. This Court granted the writ on October 9, 1961, and transferred the case to the Summary Calendar (368 U.S. 811). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Do the regulations promulgated by the Secretary of the Treasury of the United States with respect to the registration of, and other matters concerning, United States Savings Bonds prescribe merely a convenient

method for the discharge by the United States of its obligations on such bonds, or, as the courts of many states have held and the Treasury Department of the United States has consistently urged, do these regulations also, in the absence of fraud, control the beneficial ownership of such bonds irrespective of the laws of particular states?

STATUTE AND REGULATIONS INVOLVED

This case involves the interpretation of certain regulations promulgated by the Secretary of the Treasury of the United States in the exercise of the authority vested in him by Section 22(a) of the Second Liberty Bond Act as amended, 55 Stat. 7, 31 U.S.C. § 757c(a). That statute provides:

> "The Secretary of the Treasury, with the approval of the President, is authorized to issue from time to time, through the Postal Service or otherwise, United States savings bonds and United States Treasury savings certificates, the proceeds of which shall be available to meet any public expenditures authorized by law, and to retire any outstanding obligations of the United States bearing interest or issued on a discount basis. The various issues and series of the savings bonds and the savings certificates shall be in such forms, shall be offered in such amounts, subject to the limitation imposed by Section 21 of this Act, as amended [31 U.S.C. § 757b], and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b), (c), and (d) hereof, and including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe."

The pertinent regulations, 31 C.F.R. §§ 315.0, *et seq.*, are set forth in the Appendix (pp. 35-38).

STATEMENT

Petitioner John W. Free and his late wife, Ida Free, lived during the many years of their marriage and until Mrs. Free's death together in the State of Texas (R. 1). During the marriage, in the years 1941 through 1945, Petitioner purchased a number of United States Savings Bonds of the "E" and "F" series, using for that purpose community funds of himself and his wife, and registered each of them in the names of himself "or" his wife (R. 2-3).[1] The relevant regulations of the Secretary of the Treasury, incorporated by reference on the face of all United States Savings Bonds, provide that under this form of registration the persons named are "coowners" of the bonds [31 C.F.R. § 315.7(a)(2)], that upon the death of one "the survivor will be recognized as the sole and absolute owner" [31 C.F.R. § 315.61], and that "[n]o judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by these regulations" [31 C.F.R. § 315.20(a)]. See Appendix, pp. 35, 36, 37.

Ida Free died testate in Texas in April, 1958. In her will Respondent James F. Bland, a son of Ida Free by a previous marriage, was named both executor and residuary legatee (R. 2-3).

In March 1959, Petitioner brought suit in the Dis-

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[1] The bonds were variously registered in the names of "Mrs. Mary Ida Free or John W. Free", "John W. Free or Mrs. Mary Ida Free", "John W. Free or Mary Ida Free", "John W. Free or Mrs. Ida Free", and "J. W. Free or Mrs. Ida Free". In each case the designation referred to Petitioner and his wife.

trict Court of Upshur County, Texas (R. 1), seeking a judicial declaration that upon the death of his wife Petitioner became the sole owner of the bonds above referred to, and that Respondent had no interest in said bonds either as executor of the estate of Ida Free or as legatee under her will. Respondent answered, controverting Petitioner's claim, and filed a cross-action alleging that because the bonds had originally been purchased with community property of Petitioner and Ida Free, Respondent became the owner of a one-half interest in the bonds at the date of Ida Free's death or was in any event entitled to a judgment against Petitioner for a sum equal to one-half the value of the bonds. In this answer and cross-action Respondent also alleged that the bonds had been initially purchased by Petitioner J. W. Free "without the knowledge or consent of Ida Free, his wife" (R. 23), but no fraud was alleged and Respondent agreed that Mr. and Mrs. Free "lived together as husband and wife until the date of the death of the said Ida Free, on April 23, 1958" (R. 22), almost seventeen years after the first bond purchase and more than twelve years after the last one (R. 1-3, 23-25). In his answer to the cross-complaint, Petitioner denied, *inter alia*, the allegation that the bonds had been purchased without the knowledge or consent of his wife (R. 27).

On Petitioner's motion for summary judgment (R. 5), the district court adjudged Petitioner to be the owner of the bonds in controversy. At the same time, however, the court entered judgment for Respondent against Petitioner for one-half the value of the bonds, and declared a lien against the bonds for the amount of this judgment. In substance, therefore, Petitioner's claim that he was entitled to absolute ownership of the

bonds was rejected and Respondent's claim to one-half of the bonds was upheld.

Petitioner appealed to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, urging that the trial court had erred in failing to follow a controlling decision of the Texas Supreme Court [*Ricks* v. *Smith*, 159 Tex. 280, 318 S.W. 2d 439 (1958)] which had held that questions of ownership of and rights in United States Savings Bonds are controlled not by state law but by the federal regulations, duly promulgated by the Secretary of the Treasury of the United States, under which those bonds are issued. The Court of Civil Appeals affirmed the judgment of the trial court insofar as it found Petitioner to be the owner of the bonds, and reversed that judgment insofar as it had awarded to Respondent one-half their value, agreeing with Petitioner that the case was directly controlled by *Ricks* v. *Smith*, *supra*, which had held the federal regulations to be applicable and dispositive. The court expressly noted that Respondent had not alleged that Petitioner's action in purchasing and registering the bonds had constituted a fraud, actual or constructive, upon Petitioner's wife, and that the facts of record demonstrated the absence of any fraud (R. 35-36).

Respondent sought review of this judgment in the Texas Supreme Court by writ of error (R. 38). While the application for the writ was pending, that court handed down its decision in *Hilley* v. *Hilley*, 161 Tex. 569, 342 S.W. 2d 565 (1961) (Appendix B to Petition for Certiorari, pp. 13a *et seq.*), a case involving not United States Savings Bonds but corporate securities. In that case the Supreme Court of Texas held that where corporate securities were purchased with funds constituting community property, their registration at

the joint request of the husband and wife in coownership form purporting to provide for survivorship did not serve to sever such securities from the community estate and that, accordingly, on the death of either spouse one-half of such securities passed to his or her estate regardless of the purported survivorship registration. The court stated that under Texas law, in order to permit community property to pass *in toto* by survivorship, it must first be partitioned by a formal agreement meeting the requirements of Article 4624a of the Texas Civil Code; jointly owned (but not community) property may then be made the subject of a written survivorship agreement executed between husband and wife which meets the requirements of Section 46 of the Texas Probate Code. See 161 Tex. at 579, 342 S.W. 2d at 571, Appendix B to Petition for Certiorari, p. 24a.[2]

In the course of its opinion in the *Hilley* case, the Supreme Court of Texas specifically overruled its prior

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[2] Article 4624a, Tex. Civ. Stat. (Vernon, 1960), provides that a husband and wife may partition community property "in severalty or into equal undivided interests", but this can be done only "by a written instrument subscribed and acknowledged by both spouses in the manner now required by law for the conveyance of realty". Section 46 of the Texas Probate Code (Vernon, 1956) prohibits survivorship in the case of jointly owned property unless provided "by an agreement in writing of joint owners of property."

On May 15, 1961, largely as a result of the decision in the *Hilley* case, the Texas legislature amended the law by adding to Section 46 of the Probate Code the further specific provision that "any husband and his wife may, by written agreement, create a joint estate out of their community property, with rights of survivorship." Tex. Sess. Laws, 57th Reg. Sess. 1961, Ch. 120, 3 Vernon's Tex. Sess. Law Serv. 233 (1961).

decision in *Ricks* v. *Smith, supra,* stating that "the Federal regulations do not override our local laws in matters of purely private ownership. . . ." From this it followed that United States Savings Bonds, like ordinary corporate securities, purchased by a husband and wife with community property and registered in their names as coowners, would on the death of one be treated in Texas not as the property of the other, as provided by the Treasury Regulations, but as community property belonging half to the surviving spouse and half to the estate of the deceased spouse. See 161 Tex. at 577, 342 S.W. 2d at 570, Appendix B to Petition for Certiorari, pp. 20a-25a.

On the basis of this decision the Texas Supreme Court thereupon reversed the judgment of the Court of Civil Appeals in this case and affirmed that of the trial court, awarding half of the value of the bonds to Respondent, the residual legatee and executor of the estate of Mrs. Free, the deceased spouse (R. 53).

SUMMARY OF ARGUMENT

I. The Treasury Regulations applicable to United States Savings Bonds were validly issued pursuant to Section 22(a) of the Second Liberty Bond Act of 1917, as amended [31 U.S.C. §757c (a)]. Similar regulations in effect prior to reenactment of this statutory provision in 1941 (55 Stat. 7) were thereby ratified and approved by Congress. And this Court has held that a comparable provision of the National Service Life Insurance Act with respect to designation of beneficiaries properly supersedes inconsistent state law. *Wissner* v. *Wissner,* 338 U.S. 655.

The principal argument urged in support of the decision below—that the Treasury Regulations with

respect to survivorship of coowner Savings Bonds are intended only to provide a convenient means for discharge of the Government's Savings Bond obligations and are not intended to supersede state law with respect to ownership of the proceeds—is refuted by the plain language of the regulations themselves. The specific provision that "no judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by these regulations" makes it clear that the intent is in fact to fix ownership in the survivor as a feature of coowner Savings Bonds, regardless of state property law—a feature that renders them particularly suitable and attractive to certain classes of investors. The Treasury Department has consistently so interpreted its regulations, and the overwhelming weight of authority of the courts which have considered the question supports this interpretation.

The contrary judgment of the Supreme Court of Texas that a husband and wife in that state cannot obtain the survivorship benefits provided by the regulations if they buy Savings Bonds with their community property must therefore be reversed.

II. The bonds here were properly registered in the names of Mr. "or" Mrs. Free, as coowners. No fraud was alleged by Respondent below, and no fraud is shown on this record. Since this case arises on motion for summary judgment, the controverted allegation that the bonds were initially purchased without the knowledge or consent of Petitioner's wife presents an issue of fact which, if controlling, must be set down for trial. Even if this allegation is assumed to be true, however, this fact alone would not constitute such fraud or impropriety as to make coowner registration of the bonds

improper or defeat the survivorship provided by the regulations. The Texas Court of Civil Appeals, the only court below which considered this question, so held. In a situation in which, as that court put it, whether he or his wife would die first was "unpredictable," Petitioner chose in good faith to invest certain of the community property of himself and his wife in United States Savings Bonds, registered in the only form available to coowners, in accordance with the full authority given to him under Texas law to manage and invest the community estate. Under these circumstances, regardless of whether he or his wife died first, the survivorship provided for by the Treasury Regulations should be given full force and effect.

ARGUMENT

At the outset it should be noted that the decision of the Supreme Court of Texas is not based on any theory that the coownership registration of the United States Savings Bonds in question constituted a fraud on the rights of any party. The holding of that court, as explained in its opinion in the *Hilley* case, is that, although full ownership of community property is admittedly in the husband and wife jointly and in no one else, this property may not be used by either or both of them to purchase United States Savings Bonds in coownership form so as to obtain the survivorship benefits provided to such coowners by federal law and regulations:

> "It is clear that the Federal Regulations do not override our local laws in matters of purely private ownership. . . ." (161 Tex. at 577, 342 S.W. 2d at 570, Appendix B to Petition for Certiorari, p. 22a).

In the view taken by the court below, the result is the same whether the purchase of the Savings Bonds is made by the husband alone (as manager of the community estate) or by both husband and wife acting together; in either case, if the funds which were used for the bond purchase constituted community property, the surviving spouse is not to be recognized in Texas as "the sole and absolute owner" of the bonds as provided by the Treasury Regulations, because such a holding would be inconsistent with the provisions of Texas law with respect to the procedure required to sever community property.[3]

We shall urge in Point I below that the applicable Treasury Regulations are in fact intended to and do, absent fraud, establish in the surviving spouse full and absolute ownership of United States Savings Bonds properly registered in coownership form in the names of husband and wife, regardless of whether this result would otherwise follow under local property law. This requires that the contrary judgment of the court

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[3] In the *Hilley* case itself, the husband and wife acting together had used community property to buy corporate bonds registered in coownership form purporting to provide for survivorship, and the wife died first. In *Ricks* v. *Smith*, *supra*, 159 Tex. 280, 318 S. W. 2d 439 (1958), the husband alone had used community property to buy United States Savings Bonds which he registered in coownership form, and the husband himself died first. Under the court's opinion in the *Hilley* case, no survivorship is allowed in either situation, the court having concluded that "the Ricks case should be overruled, and we will not follow the same where 'or' bonds are purchased with community funds and issued in the names of the spouses as co-owners" (161 Tex. at 578, 342 S.W. 2d at 571, Appendix B to Petition for Certiorari, p. 23a).

below must be reversed. Thereafter, in Point II, we shall urge that even if the controverted allegation that the bonds were purchased without the knowledge or consent of Petitioner's wife is assumed to be true, this alone would not constitute impropriety or fraud in the initial registration of ownership of these bonds which could affect this survivorship.

I

The Treasury Regulations Effectively Provide for Survivorship of Properly Registered Coowner Savings Bonds Regardless of Whether Such Survivorship Is Recognized or Permitted by Local Law

Acting pursuant to Article I, Section 8 of the Constitution,[4] Congress in 1935 amended the Second Liberty Bond Act of 1917 (40 Stat. 288, 506) by adding thereto a new Section 22 (49 Stat. 21). Section 22(a), as amended and reenacted in 1941 [55 Stat. 7, 31 U.S.C. § 757c(a)], specifically authorizes the Secretary of the Treasury with the approval of the President to issue "United States savings bonds and United States Treasury savings certificates." This statute further provides that:

> "The various issues and series of the savings bonds and the savings certificates shall be in such forms, shall be offered in such amounts . . . and shall be issued in such manner and subject to such terms and conditions . . . , and including any restrictions

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[4] "The Congress shall have Power . . . To borrow Money on the credit of the United States. . . ."

on their transfer, as the Secretary of the Treasury may from time to time prescribe."[5]

In accordance with this authority, the Secretary of the Treasury has promulgated and amended from time to time comprehensive regulations with respect to United States Savings Bonds and Certificates. These regulations are contained in Treasury Department Circular 530, now included as Section 315 of Title 31, Code of Federal Regulations. Those pertinent here are contained in the Appendix to this brief (pp. 35-38).

All of the bonds in question here were purchased in the period 1941-1945 (R. 2-3), and were registered in the coownership form prescribed by Section 315.7(a)(2), in the name of Petitioner John W. Free "or" his wife, Mrs. Ida Free. Section 315.61 of the regulations provides that, with bonds so registered, "if either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner." Section 315.20(a) emphasizes the objective of the regulations to insure these rights of survivorship by providing specifically that "no judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by these Regulations upon a surviving coowner. . . ."

Petitioner does not understand that Respondent contends here that these regulations are invalid or beyond

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[5] The statutory language authorizing the Secretary of the Treasury to prescribe the terms and conditions of these savings bonds and certificates is drawn largely from the language of § 6 of the original Second Liberty Bond Act of 1917, 40 Stat. 291, but with the addition of the specific authority to include "any restrictions on their transfer."

the statutory or constitutional authority of the Secretary of the Treasury to prescribe, and indeed no such argument could seriously be advanced. Federal regulations promulgated in the exercise of a constitutional power duly delegated by Congress have in all respects the force and effect of federal law, and by virtue of Article VI of the Constitution of the United States are "the supreme law of the land". The authority of the Secretary of the Treasury to issue comparable regulations with respect to War Savings certificates and stamps issued pursuant to Section 6 of the Second Liberty Bond Act of 1917 was upheld by this Court in two criminal actions, *United States* v. *Sacks*, 257 U.S. 37, and *United States* v. *Janowitz*, 257 U.S. 42. See also *Warren* v. *United States*, 68 Ct. Cl. 634 (1929), *cert. denied*, 281 U.S. 739.*

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* It should also be noted that for several years prior to the reenactment in 1941 (55 Stat. 7) of Section 22 of the Second Liberty Bond Act, added in 1935 (49 Stat. 21), Treasury Regulations issued under this section had provided for survivorship with respect to coowner registered bonds and stated that no judicial proceedings "will be recognized if they would . . . impair the rights of survivorship conferred by these regulations upon coowners. . . ." See Circular 530, Second Revision of December 15, 1938, 31 C.F.R. (1938 Supp.) §§ 315.10, 315.15(a), 3 Fed. Reg. 3128. Reenactment of Section 22(a) by Congress in 1941 under these circumstances constituted legislative approval of this administrative action. *Commissioner* v. *Flowers*, 326 U.S. 465, 469; *Boehm* v. *Commissioner*, 326 U.S. 287, 291-92; *Helvering* v. *Winmill*, 305 U.S. 79, 83.

The legislative history of the 1941 reenactment makes it clear that it was the purpose of Congress to make even broader the discretion of the Secretary of the Treasury in prescribing such terms and conditions of Savings Bonds as would make them attractive to investors on a broad basis. Secretary Morgenthau emphasized

Furthermore, this Court has upheld the application of a comparable provision of the National Service Life Insurance Act with respect to designation of beneficiaries of such insurance policies. *Wissner* v. *Wissner*, 338 U.S. 655. In this case a soldier purchased National Service Life Insurance with funds which constituted community property of himself and his wife under applicable California law. Relying on the provisions of the National Service Life Insurance Act [38 U.S.C. § 802(g)], he designated persons other than his wife as beneficiaries. On his subsequent death the California state courts held that under California law the proceeds of the policy were the community property of the widow and the decedent's estate, and entered judgment in favor of the widow for one-half of such proceeds. This Court reversed, holding that the purpose and policy of the National Service Life Insurance Act to give policyholders the right to designate beneficiaries, an objective "within the Congressional powers of national defense", controlled in spite of the conflicting provisions of California community property law.

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this point in the hearings on the bill when he said that it "provides authority to issue securities on such terms and in such denominations as will enlist support from the largest number of subscribers." *Hearings on H.R. 2959 before the Senate Committee on Finance*, 77th Cong., 1st Sess., p. 5 (1941). On the floor, Representative Doughton said that the Congressional intent was to give "greater flexibility to our defense financing program". He added: "It is felt that if the Secretary of the Treasury has wider discretion with respect to these important aspects, it will better enable the Treasury to issue the exact type of security which might best meet the needs of particular types of investors". 87 Cong. Rec. 850 (1941).

Nor can it be urged that the Treasury Regulations, properly read, are intended merely to provide a convenient method whereby the United States can discharge its obligation with respect to United States Savings Bonds by payment, leaving the states free in all cases to order any retransfer or repayment of the proceeds of such bonds which they deem consistent with their personal property laws. Examination of the survivorship provisions of the regulations with respect to coowner bonds leaves no room for doubt that their intent is to fix absolute ownership in the surviving coowner or beneficiary as an additional feature of the security itself—a feature which becomes an integral part of the contract between the bondholder and the United States—and not merely to provide a means of protecting the Treasury in making payment to such survivor or beneficiary. The actual language used is consistent only with such an interpretation, and amendments made in the regulations from time to time have plainly been designed to eliminate possible ambiguities on this score. In addition, the Treasury Department has officially and publicly so construed its regulations in interpretative memoranda issued since at least 1945, and has consistently taken this position in private litigation with respect to bond ownership. Such interpretation by an agency of its own regulations is entitled to great weight. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414. Finally, an overwhelming majority of the courts which have considered the question have so interpreted and applied the regulations.

A. THE LANGUAGE OF THE REGULATIONS IS DIRECTED TO OWNERSHIP, NOT METHOD OF PAYMENT

The applicable Treasury Regulations are contained in Treasury Circular 530, first issued in 1935 and revised from time to time. The latest (eighth) revision was promulgated December 31, 1957, and is contained in Title 31, Part 315, Code of Federal Regulations (Appendix, pp. 35-38). Section 315.0 provides that these regulations "apply generally to all United States Savings Bonds of all series of whatever designation, bearing any issue dates whatever", subject to the limitation contained in Section 315.93 that nothing in the regulations shall "limit or restrict any existing rights which holders of savings bonds heretofore issued may have acquired" under circulars or regulations in force at the time of purchase.

The starting point in construing these regulations must be the provision prescribing the registration form of the bonds. Section 315.5 requires that the purchaser of the bond must express its actual ownership accurately in its registration: "The form of registration used must express the actual ownership of and interest in the bond and . . . will be considered as conclusive of such ownership and interest", except for correction of errors (Section 315.48) and except for a limited effect permitted to be given to judicial determinations of ownership in Subpart E of the regulations (discussed below).[7] All of the bonds in question here, purchased

[7] In the First Revision of Circular 530 (the earliest version published in the Federal Register), there was no explicit requirement that the form of registration must express actual ownership of the bond. See 31 C.F.R. (Orig. ed. 1937) § 315, 1 Fed. Reg. 2212. In the Second Revision in 1938, it was stated that the form of registration used "should" express the actual ownership. See 31

with the community property of Mr. and Mrs. Free, were properly registered in their names as "coowners" under Section 315.7(a)(2).

Implementing these coownership registration provisions, Section 315.15 provides that "Savings bonds are not transferable and are payable only to the owners named thereon, except as specifically provided in the regulations in this part and then only in the manner and to the extent so provided. . . ."[8]

Section 315.61 further provides explicitly that "[i]f either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner."[9] That this survivorship provision,

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C.F.R. (1938 Supp.) § 315.1(a), 3 Fed. Reg. 3128. The word "should" was replaced with the present word "must" by the Third Revision of March 27, 1940. See 31 C.F.R. (1940 Supp.) § 315.2(a), 5 Fed. Reg. 1267.

[8] The provision in substantially this form was first included in Circular 530, Second Revision, December 15, 1938, 31 C.F.R. (1938 Supp.) § 315.2, 3 Fed. Reg. 3128. Prior thereto this regulation had contained the additional exception of "as the result of judicial proceedings". 31 C.F.R. (Orig. ed., 1937) § 315.2, 1 Fed. Reg. 2212.

[9] A survivorship provision has been included in Circular 530 since the beginning. See 31 C.F.R. (Orig. ed. 1937) § 315.10, 1 Fed. Reg. 2212. The Fourth Revision, effective May 1, 1941, first included the language that "the surviving co-owner will be recognized by the Treasury Department as the sole and absolute owner of the bond. . . ." See 31, C.F.R. (1941 Supp.) § 315.11(a)(2), 6 Fed. Reg. 2191. To make even clearer that this was intended to control actual ownership and not merely administrative action by the Treasury Department, the words "by the Treasury Department" were deleted in the Fifth Revision of June 17, 1943. See 31 C.F.R. (1943 Supp.) § 315.32(b), 8 Fed. Reg. 8744. The

like the limitation on *inter vivos* transfer or pledge of the bonds, and like the beneficiary provisions of Section 315.65 (Appendix, pp. 37-38), is intended to determine the substantive ownership of the bonds and not provide merely a convenient method of payment by the Treasury is confirmed by the provisions of Subpart E of the Regulations, which is entitled "Limitation on Judicial Proceedings; No Stoppage or Caveats Permitted." Section 315.20(a) provides:

> "No judicial determination will be recognized which would give effect to an attempted voluntary transfer inter vivos of a bond or would defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner or beneficiary, and all other provisions of this subpart are subject to this restriction." [10]

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present survivorship language, not materially changed, was adopted in the Eighth Revision of December 31, 1957. See 31 C.F.R. § 315.61 (1959), 22 Fed. Reg. 11065.

[10] The First Revision of Circular 530 provided that payment would be made "in accordance with a judgment or decree of a court of competent jurisdiction . . . except in cases where the action is instituted for the purpose of giving effect to an attempted transfer by the owner contrary to § 315.2" [the regulation then prohibiting such transfer]. See 31 C.F.R. (Orig. ed., 1937) § 315.15(a), 1 Fed. Reg. 2212. Since this provision could be read as permitting a judicial determination under state law to defeat survivorship rights, the present language expressly negativing this conclusion was included in the Second Revision of Circular 530 of December 15, 1938 in the form of a proviso that "no such proceedings will be recognized if they would give effect to an attempted voluntary transfer of the bonds or would defeat or impair the rights of survivorship conferred by these regulations upon coowners and beneficiaries". See 31 C.F.R. (1938 Supp.) § 315.15 (a), 3 Fed. Reg. 3128. This language was thereafter continued

The regulations then go on to provide that subject to the foregoing limitation certain judicial proceedings may establish ownership claims to the bonds. The use of the expression "rights of survivorship *conferred* by these regulations upon a surviving coowner or beneficiary," coupled with the provision prohibiting recognition of any judicial determination which would "defeat or impair" such rights, lays to rest any question of the intent or purpose sought to be accomplished.

The regulations are incorporated by reference in the Savings Bonds themselves, and it is plain beyond cavil that they are intended to confer upon those who choose to invest their money in these bonds the assured substantive rights of survivorship provided—a feature that can and does make such bonds a more attractive investment than they would otherwise be. Such assurance constitutes a "term or condition" of the bond which carries out the Constitutional power "to borrow money on the credit of the United States," and appropriately implements the Congressional policy expressed by Respresentative Doughton with respect to the 1941 reenactment of the basic Savings Bond law, to "enable the Treasury to issue the exact type of security which might best meet the needs of particular types of investors." 87 Cong. Rec. 850 (1941); see note 6, pp. 14-15, *supra*.

B. THE TREASURY DEPARTMENT HAS CONSISTENTLY INTERPRETED THE SURVIVORSHIP REGULATIONS AS CONTROLLING SUBSTANTIVE OWNERSHIP

As stated in the brief *amicus curiae* of the United States, the Treasury Department has for many years taken the position that its survivorship and beneficiary

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in subsequent revisions, the present language having been adopted in the Eighth Revision of December 31, 1957. See 31 C.F.R. § 315.20(a) (1959), 22 Fed. Reg. 11065.

regulations were intended to control substantive ownership of the bonds and their proceeds as part of the contract between the United States and the bondholder, and not to provide merely a convenient method of discharging the Government's monetary obligation. For almost twenty years, the Treasury has consistently participated as *amicus curiae*, through United States attorneys, in private litigations in which this question was known to be presented and has consistently urged that substantive legal effect be given to its savings bond regulations. See, *e.g.*, In re *Di Santo's Estate*, 142 Ohio St. 223, 51 N.E. 2d 639 (1943); *Franklin Washington Trust Co.* v. *Beltram*, 133 N.J. Eq. 11, 29 A.2d 854 (1943); In re *Murray's Estate*, 236 Iowa 807, 20 N.W. 2d 49 (1945); *Harvey* v. *Rackliffe*, 141 Me. 169, 41 A. 2d 455 (1945). In addition, a memorandum setting forth these views has been publicly circulated to issuing banks and others since 1945, and has been widely distributed in response to inquiries received. A copy of the current revision of this memorandum is included as an appendix to the Government's brief *amicus curiae* here.

The Treasury Department's long-standing interpretation of its own regulations should be given controlling effect. As this Court stated in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414:

> ". . . a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the ad-

ministrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

C. THE OVERWHELMING WEIGHT OF AUTHORITY OF THE COURTS WHICH HAVE CONSIDERED THE QUESTION SUPPORTS THE TREASURY DEPARTMENT'S INTERPRETATION OF ITS REGULATIONS

In the quarter century since enactment of the 1935 amendment authorizing issuance of United States Savings Bonds, the question of the effect to be given the Treasury Regulations with respect to survivorship and transferability of bonds registered in coownership or beneficiary form has come up in literally dozens of reported cases. These have been adequately compiled and classified elsewhere,[11] and it would serve no useful purpose to repeat these citations here. Even a cursory review of these decisions makes it clear that, with only a few aberrations (including that of the court below), the various courts that have considered the question have sustained the Treasury's view that, in the absence of fraud, the rights of survivorship conferred by the regulations and incorporated in coowner and beneficiary bonds are conclusive and cannot be defeated by the applicability of inconsistent rules of state law.

Typical cases involve conflict with state law with

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[11] Cases involving bonds registered in coowner form, as here, are collected in 37 A.L.R. 2d 1221 and supplements thereto. A number of the cases involving beneficiary registered bonds are included in annotations in 168 A.L.R. 245 and 173 A.L.R. 550. Decisions dealing with the related question of the transferability of such bonds are compiled in 40 A.L.R. 2d 788 and supplements thereto.

respect to descent and distribution of property,[12] requirements for valid gifts *inter vivos*,[13] or abolition of or limitation on survivorship of jointly owned property.[14] In each situation, it has been recognized that, as the Supreme Court of Arizona succinctly put it, "the state constitution and statutes must yield to Federal laws which are the supreme law of the land." *Lee* v. *Anderson*, 70 Ariz. 208, 214, 218 P.2d 732, 736 (1950).

The minority position is typified by *Slater* v. *Culpepper*, 222 La. 962, 64 So. 2d 234 (1953) cited by the court below in its *Hilley* opinion. Here the Supreme Court of Louisiana refused to recognize the survivorship provisions of the regulations with respect to coowner bonds bought with community property by the wife acting for herself and her physically disabled husband, the wife then having died first. In holding that the surviving husband had only a half

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[12] See, *e.g.*, Ex parte *Little*, 259 Ala. 532, 67 So. 2d 818 (1953); *Umberger* v. *Westmoreland*, 218 Ark. 632, 238 S.W. 2d 495 (1951); In re *Stanley's Estate*, 102 Colo. 422, 80 P.2d 332 (1938); In re *Briley's Estate*, 155 Fla. 798, 21 So.2d 595 (1945); *Reynolds* v. *Reynolds*, 325 Mass. 257, 90 N.E.2d 338 (1950); *Berman* v. *Frendel*, 154 Me. 337, 148 A.2d 93 (1959); *Stephens* v. *First Nat. Bank of Nevada*, 65 Nev. 352, 196 P.2d 756 (1948); In re *Gilger's Estate*, 109 N.E.2d 333 (Ohio P. Ct. 1952).

[13] See, *e.g.*, *Lee* v. *Anderson*, 70 Ariz. 208, 218 P.2d 732 (1950); *Knight* v. *Wingate*, 205 Ga. 133, 52 S.E.2d 604 (1949); *Harvey* v. *Rackliffe*, 141 Me. 169, 41 A.2d 455 (1945); *Stephens* v. *First Nat. Bank of Nevada*, 65 Nev. 352, 196 P.2d 756 (1948); *In re Cochran's Estate*, 398 Pa. 506, 159 A.2d 514 (1960).

[14] See, *e.g.*, *Lee* v. *Anderson*, 70 Ariz. 208, 218 P.2d 732 (1950); *Lemon* v. *Foulston*, 169 Kan. 372, 219 P.2d 388 (1950); *Waltenberger* v. *Pearson*, 81 Ohio App. 51, 77 N.E.2d 491 (1946); In re *Chittock's Estate*, 106 N.E. 2d 320 (Ohio P. Ct. 1952).

interest in the bonds, the court said (222 La. at 970, 64 So. 2d at 237):

> "Manifestly, these regulations . . . were designed solely to facilitate the Government, by providing a simple method for the payment of savings bonds, so that it would not be subjected to the inconvenience and delays attendant to the settlement of conflicting or disputed claims." [15]

This approach, that the Treasury Regulations do not control ownership but merely provide a convenient method of discharging the Treasury's obligation, was apparently first advanced some twenty years ago by the Supreme Court of Washington in *Decker* v. *Fowler,* 199 Wash. 549, 92 P. 2d 254 (1939), a decision which was promptly repudiated by state legislation [Wash. Rev. Stat. (Rem. Supp. 1943), §§ 11548-60, 11548-61]. The court below rested its decision on the same erroneous interpretation of federal law when it said that "the federal regulations do not override our local laws in matters of purely private ownership where the interests of the United States are not involved", citing *Bank of America N.T. & S.A.* v. *Parnell,* 352 U.S. 29 (161 Tex. at 578, 342 S.W. 2d at 570, Appendix B to Petition for Certiorari, p. 22a).

The fallacy in this statement arises from the er-

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[15] Similar expressions have occasionally been used in tax cases in the federal courts involving the question of whether effect could be given to attempted *inter vivos* gifts of coowner or beneficiary Savings Bonds. See, *e. g., Silverman* v. *McGinnes,* 259 F.2d 731, 733 (3d Cir. 1958); *District of Columbia* v. *Wilson,* 94 U.S. App. D.C. 399, 403, 216 F.2d 630, 633 (1954).

roneous assumption that "the interests of the United States are not involved" in the question of the ownership of a Savings Bond on the death of a coowner.[16] This question was put in proper perspective by the Supreme Court of Nevada in upholding survivorship in *Stephens* v. *First National Bank of Nevada,* 65 Nev. 352, 196 P. 2d 756 (1948). After stating that the Treasury Regulations "having the force of Federal Law must be held to supersede inconsistent State Laws by virtue of the supremacy clause of the Constitution", that court emphasized that any other decision "would tend to destroy the power of the United States to sell bonds", because the availability of the survivorship provisions was "one of the reasons why said bonds became and were and are attractive investments and aided in the sale thereof" (65 Nev. at 365, 196 P. 2d at 762).

II

The Savings Bonds Were Properly Registered in the Names of Mr. or Mrs. Free as Coowners, and No Fraud Is Shown on This Record

Petitioner has not at any point in this case contended that the Treasury Regulations with respect to coownership or survivorship have the purpose or

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[16] The *Bank of America* case involved merely the question of who had the burden of proof on the issue of whether bearer bonds of the Government were purchased in good faith. This Court held that the federal interest under these circumstances was too remote to justify the application to this question of a federal rule in lieu of state commercial law. Even here, the Court stated that "Federal law, of course, governs the interpretation of the nature of the rights and obligations created by the Government bonds themselves" (352 U.S. at 34).

effect of providing a refuge against fraud. The basic provision of Section 315.5 that the form of registration "*must* express the actual ownership of and interest in the bond" necessarily implies that the purchaser or purchasers must own or have authority so to invest the funds used. See, *e.g., Katz* v. *Driscoll*, 80 Cal. App. 2d 313, 194 P. 2d 822 (1948). If such ownership or authority exists, however, the fact that a coownership or beneficiary registration of the bond would not be effective under state law to vest the intended property interest in a coowner, survivor or beneficiary is immaterial. That property interest is determined by the contract between the purchaser or purchasers and the United States, as fixed in the terms of the bond and the controlling Treasury Regulations which are made a part thereof.

A. REGISTRATION OF THE BONDS IN COOWNERSHIP FORM PROPERLY EXPRESSED THEIR ACTUAL OWNERSHIP

United States Savings Bonds purchased by a husband and wife with their community property and registered in the coownership form prescribed by Section 315.7(a)(2) plainly meet the requirement that the "registration must express the actual ownership of and interest in the bond." The husband and wife, and only the husband and wife, have an interest in this community property, and they, and only they, have an interest in the Savings Bond which they purchase with such property. The fact that such bond purchase in conjunction with subsequent events may effect a severance of this community property in a way not recognized by state law is one of the intended benefits conferred by the Treasury Regulations incorporated in the terms and conditions of the bond, and one

of the characteristics of the bond that makes it particularly desirable to many investors.[17]

Joint investment by the husband and wife of their community property in a Savings Bond registered in coownership form, therefore, results in full ownership of the bond in the survivor in accordance with the regulations incorporated by reference in it, contrary to the holding of the Supreme Court of Texas below. The judgment of that court must accordingly be reversed.

A question remains, however, as to what further direction this Court should give on remand of the case in view of the controverted allegation contained in the answer and cross action of Respondent, that Petitioner purchased these bonds without the knowledge or consent of his wife (R. 23). As noted above, the rationale of the Supreme Court of Texas as expressed in the controlling case of *Hilley* v. *Hilley* made this question immaterial, since the result would have been the same regardless of whether the husband alone (as in the overruled case of *Ricks* v. *Smith*) or both parties (as in the *Hilley* case itself) actually effected the purchase using community property.

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[17] In fact, since the coownership registration which was used here is exclusive, it is not otherwise possible for a husband and wife jointly to invest their community property in United States Savings Bonds. Section 315.7(a)(2) states specifically that "[n]o other form of registration establishing coownership is authorized." See Appendix, p. 35.

B. *USE OF COMMUNITY PROPERTY BY A HUSBAND TO PURCHASE COOWNER SAVINGS BONDS IN HIS OWN AND HIS WIFE'S NAME WITHOUT PRIOR CONSULTATION WITH HER DOES NOT ALONE CONSTITUTE FRAUD JUSTIFYING REFUSAL TO RECOGNIZE SURVIVORSHIP*

First of all, it should be noted that this case arises on motion for summary judgment by Petitioner, made on pleadings and affidavits, including pleadings in a cross action filed by Respondent. The only allegations that the bond purchases in question were made by Petitioner "without the knowledge or consent of Ida Free, his wife" are contained in Paragraph IX of Respondent's answer (R. 21) and Paragraphs V and VII of his cross action (R. 23, 25). This and all other facts alleged in the cross petition other than those alleged in Petitioner's original petition were denied by Petitioner in his answer to the cross action (R. 27). Accordingly, under Texas summary judgment procedure, which is based upon and similar to the federal practice,[18] no summary judgment can be granted to either party if this issue is one of material fact.

Both the Court of Civil Appeals and the Texas Supreme Court below considered this factual question not to be material, but for quite different reasons. The Court of Civil Appeals held that, even if the bonds were purchased without the knowledge or consent of Petitioner's wife, as alleged by Respondent but denied by Petitioner, this did not constitute actual or constructive fraud so as to justify a refusal to recognize the survivorship provided by the Treasury Regulations, and it accordingly ordered summary judgment

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[18] Rule 166-A, Vernon's Annotated Texas Rules (1955). This is taken substantially verbatim from Rule 56 of the Federal Rules of Civil Practice, as originally promulgated. See Vernon's Annotated Texas Rules, *supra*, Vol. 1, at p. 478.

entered for Petitioner. The Supreme Court of Texas in turn held that under Texas property law the survivorship was not to be recognized whether or not the bonds had been purchased with the knowledge and consent of the wife, and it therefore affirmed the summary judgment for half the value of the bonds which had been entered by the state district court in favor of Respondent.

Accordingly, if this issue of fact is now considered to be material, the posture of the case is such that it should be remanded for trial.

We believe, however, that the record here justifies the action of the Texas Court of Civil Appeals in ordering entry of summary judgment for Petitioner even if the allegation that the bond purchases were made without his wife's knowledge or consent is assumed to be true. As heretofore pointed out, there is no disagreement that, if Petitioner had purchased these United States Savings Bonds pursuant to a scheme to obtain for himself his wife's share of the community property or otherwise to defraud her, the bonds would in fact have been improperly registered under Section 315.5 of the regulations and the property of which his wife had been so defrauded could be restored to her or her estate on appropriate judicial determination. An example of such a situation might be presented where the husband, acting alone, uses community property to buy coowner bonds in his own and his wife's name in a situation where he knows his wife is suffering from a probably fatal illness and will in all likelihood predecease him.

No allegation of anything approaching such a scheme to defraud was made here. The Texas Court of Civil Appeals summarized the record as follows:

> "There was no pleading in the case at bar that the purchase of the bonds in question was in fraud of the community property rights of Mary Ida Free. The bonds in question were bought with the Free's community funds and were made payable to either Mr. Free or Mrs. Free, in conformity with the U. S. Treasury regulations, and a full twelve years elapsed between the purchase of the bonds and the death of Mrs. Free, and certainly under this record there was no actual fraud shown on the part of the husband in investing community funds in the bonds. It is our further view that under this record the purchase of the bonds and their subsequent passing to the appellant by reason of the unpredictable prior death of Mrs. Free (and under the contractual provisions of the U. S. Treasury regulations) does not in law amount to a constructive fraud upon the estate of Mrs. Free. Also, if Mr. Free had died first and the bonds had passed to Mrs. Free under the contractual treasury regulations we do not think it could be held that a constructive fraud had been committed against Mr. Free's estate by the purchase of the bonds in question under the record in this case." (R. 35-36.)

Under Texas community property law the husband has full authority to manage, invest and reinvest the community estate; as one authority has put it, he is the "managing partner." See Huie, *Commentary on Community Property Law of Texas*, 13 Tex. Civ. Stat. 1, 44 (Vernon, 1960). During coverture, the husband alone can dispose of community property. Tex. Civ. Stat.,

Art. 4619, § 1 (Vernon, 1960). The United States Court of Appeals for the Fifth Circuit accurately summarized the law of Texas when it quoted the statement in *Rowlett* v. *Mitchell*, 52 Tex. Civ. App. 589, 592, 114 S.W. 845, 847 (1908), that the "right of the husband to dispose of the community estate except for the purpose of defrauding his wife is an absolute one . . . he may expend their joint estate ever so unwisely, may squander it in 'riotous living,' or may give it away." *Commissioner* v. *Chase Manhattan Bank*, 259 F.2d 231, 248 (5th Cir. 1958), *cert. denied*, 359 U.S. 913. And no such purpose to defraud is to be inferred from the mere fact that the husband used, invested or donated community property without the wife's knowledge or consent.[19]

Where the husband has this broad authority to deal with the community estate, the mere claim that the wife had not been consulted with respect to the bond purchase—which is all that Respondent has alleged here—is not sufficient to make the coownership registration improper or to defeat the survivorship provided by

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[19] See, e. g., *Warthan* v. *Haynes*, 155 Tex. 143, 288 S.W.2d 481 (1956) [purchase of life insurance naming husband's own estate as beneficiary if his wife predeceased him]; *Martin* v. *McAllister*, 94 Tex. 567, 63 S.W. 624 (1901) [purchase of life insurance in name of wife, naming himself as beneficiary]; *Griffin* v. *Troup Independent School District*, 163 S.W.2d 412 (Tex. Civ. App. 1942) [conveyance of land to school district]; *Locke* v. *Locke*, 143 S.W.2d 637 (Tex. Civ. App. 1940) [self-indulgence in excess of living expenses]; *Shaw* v. *Shaw*, 28 S.W.2d 173 (Tex. Civ. App. 1930) [gifts *causa mortis* of bank deposits and Liberty bonds to son's wife and daughter]; *Rowlett* v. *Mitchell*, 52 Tex. Civ. App. 589, 114 S.W. 845 (1908) [paying premiums on life insurance that named as beneficiaries husband's own children by prior marriage].

the Treasury Regulations.[20] So much at least this Court should make clear on remand. A contrary holding would throw into doubt and confusion the effectiveness of the survivorship provisions of what are undoubtedly millions of dollars of coownership bonds bought by the husband with family savings in the eight community property states,[21] and would defeat the Treasury policy to provide uniform, simple and definitive survivorship rules to all of the many small investors (including investors in these community property states) to whom bonds incorporating such rules are especially attractive. In this situation, "the desirability of a uniform rule is plain." See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367.

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[20] Compare *Wissner v. Wissner*, *supra*, 338 U.S. 655, where the husband used community property to pay premiums on the National Service Life Insurance policy in question not only without his estranged wife's knowledge or consent but under circumstances indicating strongly that he intended thereby to deprive her of any interest in such policy; this Court nevertheless upheld ownership of the proceeds of the policy in the designated beneficiary as provided for by federal law, even though the wife would have been entitled to half of such proceeds under the applicable community property law of the state. The record now before the Court presents a much clearer case for award of the bonds in full to the surviving coowner without regard for what the ownership would have been under Texas community property law.

[21] These states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. See II Casner, *American Law of Property* (1952) § 7.3.

CONCLUSION

The judgment of the Supreme Court of Texas, refusing to recognize the survivorship of United States Savings Bonds registered in coowner form in accordance with applicable Treasury Regulations, should be reversed.

Respectfully submitted,

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December 22, 1961.

APPENDIX

TREASURY DEPARTMENT CIRCULAR 530, EIGHTH REVISION, DECEMBER 31, 1957, 31 C.F.R. PART 315, 22 FED. REG. 11065

Subpart A—General Information

§ 315.0 *Applicability of regulations.* The regulations in this part apply generally to all United States Savings Bonds of all series of whatever designation, bearing any issue dates whatever, except as otherwise specifically provided herein.

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Subpart B—Registration

§ 315.5 *General.* United States Savings Bonds are issued only in registered form. The form of registration used must express the actual ownership of and interest in the bond and, except as otherwise specifically provided in Subpart E [limitation on judicial proceedings; no stoppage or caveats permitted], and § 315.48 of Subpart I [correction of errors] of this part, will be considered as conclusive of such ownership and interest. . . .

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§ 315.7 *Authorized forms of registration.* Subject to any limitations or restrictions contained in these regulations on the right of any person to be named as owner, coowner, or beneficiary, savings bonds may be registered in the following forms:

(a) *Natural persons.* In the names of natural persons in their own right.

(1) *Single owner.* Example:

"John A. Jones."

(2) *Coownership form—two persons (only).* In the alternative as coowners. Example:

"John A. Jones or Mrs. Ella S. Jones."

No other form of registration establishing coownership is authorized.

(3) *Beneficiary form—two persons (only).* Examples:

"John A. Jones payable on death to Mrs. Ella S. Jones."

"John A. Jones P. O. D. Mrs. Ella S. Jones."

"Payable on death" may be abbreviated to "P. O. D." as indicated in the last example. The first named person is hereinafter referred to as the owner and the second named person as the beneficiary.

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Subpart D—Limitation on Transfer or Pledge

§ 315.15 *Limitation on transfer or pledge.* Savings bonds are not transferable and are payable only to the owners named thereon, except as specifically provided in the regulations in this part and then only in the manner and to the extent so provided. . . .

• • • •

Subpart E—Limitation on Judicial Proceedings; No Stoppage or Caveats Permitted

§ 315.20 *General.* (a) No judicial determination will be recognized which would give effect to an attempted voluntary transfer inter vivos of a bond or would defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner or beneficiary, and all other provisions of this subpart are subject to this restriction. Otherwise, a claim against an owner or coowner of a savings bond and conflicting claims as to ownership of, or interest in, such bond as between coowners or between the registered owner and beneficiary will be recognized, when established by valid judicial proceedings, upon presentation and surrender of the bond, but only as specifically provided in this subpart.

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Subpart L—Two Natural Persons as Coowners

§ 315.60 *During the lives of both coowners.* A savings bond registered in coownership form, for example, "John A. Jones or Mrs. Mary C. Jones," will be paid or reissued during the lives of both, as follows:

(a) *Payment.* The bond will be paid to either upon his separate request, and upon payment to him the other shall cease to have any interest in the bond. If both request payment jointly, payment will be made by check drawn to their order jointly, for example, "John A. Jones and Mrs. Mary C. Jones."

* * * *

§ 315.61 *After the death of one or both coowners.* If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner. Thereafter, payment or reissue will be made as though the bond were registered in the name of the survivor alone (see Subpart K), except that a request for reissue by him must be supported by proof of death of the other coowner, and except further that after the death of the survivor proof of death of both coowners and of the order in which they died will be required. The presentation and surrender of a bond by one coowner for payment establishes his right to receive the proceeds of the bond, and if he should die before the transaction is completed, payment will be made to the legal representative of, or persons entitled to, his estate in accordance with the provisions of Subpart N. If either coowner dies after the bond has been presented and surrendered for authorized reissue (see § 315.47), the bond will be regarded as though reissued during his lifetime.

§ 315.62 *Upon death of both coowners in a common disaster, etc.* If both coowners die under such conditions that it cannot be established either by presumption of law or otherwise which died first, the bond will be considered as belonging to the estates of both equally, and payment or reissue will be made accordingly. (See Subpart N.)

Subpart M—Two Natural Persons as Owner and Beneficiary

§ 315.65 *During the lifetime of the registered owner.* A savings bond registered in beneficiary form, for example, "John A. Jones payable on death to Mrs. Mary C. Jones,"

will be paid or reissued upon presentation and surrender during the lifetime of the registered owner, as follows:

(a) *Payment.* The bond will be paid to the registered owner during his lifetime upon his properly executed request as though no beneficiary had been named in the registration. The presentation and surrender of the bond by the registered owner for payment establishes his exclusive right to the proceeds of the bond, and if he should die before the transaction is completed, payment will be made to the legal representative of, or the persons entitled to, his estate upon receipt of proof of the appointment and qualification of the representative or the identity of the persons entitled, in accordance with the provisions of Subpart N.

• • • •

§ 315.66 *After the death of the registered owner.* If the registered owner dies without the bond having been presented and surrendered for payment or authorized reissue and is survived by the beneficiary, upon proof of death of the owner the beneficiary will be recognized as the sole and absolute owner, and payment or reissue will be made as though the bond were registered in his name alone. . . .

• • • •

Subpart Q—Further Provisions

§ 315.90 *Regulations prescribed.* The regulations in this part are prescribed by the Secretary of the Treasury as governing United States Savings Bonds issued under the authority of section 22 of the Second Liberty Bond Act, as amended, and pursuant to the various Department circulars offering such bonds for sale. . . .

• • • •

§ 315.93 *Preservation of rights.* Nothing contained in the regulations in this part shall be construed to limit or restrict any existing rights which holders of savings bonds heretofore issued may have acquired under the circulars offering the bonds for sale or under the regulations in force at the time of purchase.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 205

J. W. FREE, PETITIONER

v.

JAMES F. BLAND

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The District Court of Upshur County, Texas, filed no written opinion in entering judgment (R. 28). The opinion of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas (R. 31) is reported at 337 S.W. 2d 805. The opinion of the Supreme Court of Texas (R. 53) is reported at 344 S.W. 2d 435.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on March 8, 1961 (R. 54). A timely petition for rehearing was denied on April 5, 1961 (R. 58). The petition for certiorari was filed on July 5, 1961, and granted on October 9, 1961 (R. 59). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the Treasury Department regulations governing the nature of the interests in United States savings bonds purchased in co-ownership form effectively create an absolute right to the beneficial interest in such bonds in a surviving co-owner although Texas community property law requirements for the creation of survivorship interests are not met.

STATUTE AND REGULATIONS INVOLVED

Section 757c(a) of Title 31 U.S.C. provides:

> The Secretary of the Treasury, with the approval of the President, is authorized to issue from time to time, through the Postal Service or otherwise, United States savings bonds and United States Treasury savings certificates, the proceeds of which shall be available to meet any public expenditures authorized by law, and to retire any outstanding obligations of the United States bearing interest or issued on a discount basis. The various issues and series of the savings bonds and the savings certificates shall be in such forms, shall be offered in such amounts, subject to the limitation imposed by section 757b of this title, and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b)–(d) of this section, and including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe.

Section 315.20(a) of Title 31 C.F.R. provides:

> No judicial determination will be recognized which would give effect to an attempted voluntary transfer inter vivos of a bond or would

defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner or beneficiary, and all other provisions of this subpart are subject to this restriction. Otherwise, a claim against an owner or coowner of a savings bond and conflicting claims as to ownership of, or interest in, such bond as between coowners or between the registered owner and beneficiary will be recognized, when established by valid judicial proceedings, upon presentation and surrender of the bond, but only as specifically provided in this subpart.

Section 315.61 of Title 31 C.F.R. provides:

If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner. Thereafter, payment or reissue will be made as though the bond were registered in the name of the survivor alone (see Subpart K), except that a request for reissue by him must be supported by proof of death of the other coowner, and except further that after the death of the survivor proof of death of both coowners and of the order in which they died will be required. The presentation and surrender of a bond by one coowner for payment establishes his right to receive the proceeds of the bond, and if he should die before the transaction is completed, payment will be made to the legal representative of, or persons entitled to, his estate in accordance with the provisions of Subpart N. If either coowner dies after the bond has been presented and surrendered for authorized reissue (see § 315.47), the bond will be regarded as though reissued during his lifetime.

STATEMENT

In the years 1941 through 1945, petitioner John W. Free purchased a number of United States savings bonds, using for that purpose community funds of himself and his wife, Ida Free (R. 24). He registered the bonds in the names of himself "or" his wife (R. 24). The regulations of the Secretary of the Treasury provide that under this form of registration the persons named are co-owners of the bonds (31 C.F.R. 315.7(a)(2)), and that upon the death of one "the survivor will be recognized as the sole and absolute owner" (31 C.F.R. 315.61, *supra*, p. 3). Ida Free died testate in Texas in 1958, naming respondent James F. Bland, her son by a previous marriage, as her executor and residuary legatee (R. 11, 13–14).

Petitioner brought suit in the District Court of Upshur County, Texas, seeking a judicial declaration that upon the death of his wife he became the sole owner of the bonds and that respondent had no interest in the bonds (R. 1). Respondent claimed that, because the bonds had originally been purchased with community property, they were themselves community property and that he was entitled to a one-half interest in the bonds or was in any event entitled to a judgment against petitioner for a sum equal to one-half the value of the bonds (R. 21).

The district court ruled that petitioner was the owner of the bonds (R. 28–29). At the same time, however, the court entered judgment for respondent against petitioner for $43,517.75, one-half the value of the bonds, and declared a lien against the bonds for the amount of this judgment on the ground that

the bonds had been purchased with community funds. In substance, therefore, petitioner's claim that he was entitled to absolute ownership of the bonds was rejected.

The Court of Civil Appeals for the Sixth Supreme Judicial District of Texas reversed the judgment of the District Court insofar as it awarded respondent one-half the value of the bonds, and affirmed that judgment insofar as it found petitioner to be the owner of the bonds (R. 31–36). The court ruled that the case was controlled by the decision of the Supreme Court of Texas in *Ricks* v. *Smith*, 159 Tex. 280, 318 S.W. 2d 439, which had held that the relevant Treasury regulations, not state community property law, was determinative of the rights in United States savings bonds.

While respondent's application for a writ of error was pending in the Supreme Court of Texas, that court, in *Hilley* v. *Hilley*, 342 S.W. 2d 565, a case involving corporate securities, held that a co-ownership form of registration was not sufficient to alter the normal operation of Texas community property rules, which provide that property received in exchange for an interest in community property is itself community property. In the course of its opinion, the court overruled its prior decision in *Ricks* v. *Smith*, *supra*, at 570, 571, stating that "the Federal regulations [dealing with the ownership in United States savings bonds] do not override our local laws in matters of purely private ownership where the interests of the United States are not involved", and that accordingly savings bonds registered in the

names of a husband and a wife as co-owners should, on the death of one, be treated not as the property of the other, as provided by the regulations, but, under Texas property law, as community property. Only if a husband and wife fulfill the state formalities for partition of community property and for creation of a joint tenancy could a valid survivorship interest be created with community property, the court held. On the basis of this decision, the Texas Supreme Court reversed the judgment of the Court of Civil Appeals in this case and affirmed that of the district court (R. 53).

INTEREST OF THE UNITED STATES

In our view, the decision of the Supreme Court of Texas denies effect to duly authorized Treasury Department regulations governing survivorship interests in United States savings bonds and disregards the position with regard to the survivorship provisions to which the Treasury Department has adhered since the inception of the savings bond program.

There are now outstanding over $40 billion of savings bonds in a form providing a right of survivorship such as that involved in the present case—*i.e.*, in either the "co-owner" or "beneficiary" form of registration (31 C.F.R. 315.7(a)(2) or (3)). There are probably well over $30 billion of outstanding savings bonds in the co-ownership form alone[1]. It is reasonable to assume that a large proportion of these bonds

[1] Statistics breaking down sales in each locality by type of bond sold are not maintained by the Treasury Department. Using the national average of 80% sales of co-ownership bonds, however, it is possible to estimate the amount of co-ownership bonds outstanding in the eight community property states as roughly $3,500,000,000.

were purchased specifically to obtain the survivorship benefits which the Treasury Department has stated were created by these forms of registration. To permit the mutations of state property law to derogate from the absolute right of survivorship intended by the Federal Government would seriously detract from the appeal of savings bonds to small-scale purchasers, would probably induce many present holders to redeem their bonds, and could undermine the faith of the public in incidental representations by the Treasury concerning future security offerings—all to the detriment of government financing.

SUMMARY OF ARGUMENT

For over twenty-five years the Treasury Department has been selling United States Savings Bonds in the co-ownership form. At present approximately $30,000,000,000 of these bonds are outstanding, issued under a broad statutory authority for the Treasury to issue bonds in the form it deems best. The breadth of the legislative authorization is attributable to the legislative desire to enable the Treasury to compete effectively but not disruptively in the market for investment dollars.

A significant advantage of bonds in the co-ownership form is the provision for survivorship which enables small and inexpert investors to combine continuity of ownership spanning two lives with shared ownership during the lives of both of the owners. Equally important as an inducement to the purchase of co-ownership bonds is the simplicity and certainty of the legal relationships established and the absolute minimum of formalities required to create them.

The purpose of the pertinent Treasury Regulations is to provide these advantages for investors in co-ownership bonds throughout the country. The regulations specify clearly that "the survivor will be recognized as the sole and absolute owner" of bonds registered in the co-ownership form. They deny recognition to judicial determinations which "would defeat or impair the rights of survivorship conferred by these regulations." That the protection granted by these regulations is intended to preclude conflicting state laws is plain from the wording and history of the regulations and is reconfirmed by the Treasury's consistent interpretation of its own regulations over the last twenty-two years.

It is no less clear that the application of Texas community property law to prevent the use of community property by husband and wife together to create survivorship rights in United States savings bonds is in conflict with the Treasury regulation denying recognition to judicial determinations which "defeat or impair the rights of survivorship conferred by these regulations".

ARGUMENT

I

THE SECRETARY OF THE TREASURY IS INVESTED BY STATUTE WITH BROAD POWERS TO IMPOSE SUCH CONDITIONS UPON AND GIVE SUCH EFFECT TO SAVINGS BONDS AS HE CONSIDERS NECESSARY TO EFFECTUATE THE CONGRESSIONAL PURPOSE

Exercising its power under Article I, Section 8, of the Constitution "To borrow Money on the credit of

the United States", Congress in 1935 authorised the issuance of United States Savings Bonds, delegating to the Secretary of the Treasury broad authority to determine their characteristics:

> The various issues and series of the savings bonds * * * shall be in such forms * * * and shall be issued in such manner and subject to such terms and conditions * * * as the Secretary of the Treasury may from time to time prescribe.[2]

Congress could not have been unaware of the import of such a broad delegation. In *United States* v. *Sacks*, 257 U.S. 37, this Court described the extent of the authority granted by an earlier act in almost identical terms. The Act of September 24, 1917, Section 6, 40 Stat. 291, provided that "war savings certificates shall be in such form * * * and subject to such terms and conditions * * * as the Secretary of the Treasury may prescribe." In construing that Act, this Court had declared that war savings certificates (257 U.S. at 41)—

> provided an opportunity of investment for persons of small means, and the power to prescribe ways adequate to the purpose was given to the Secretary of the Treasury. In other words, details of execution were committed to him with power to give to the certificate * * * such character, quality and legal effect that he should consider to be efficient. * * *

Although the point was not involved in *United States* v. *Sacks, supra,* it is significant that under the 1917 authorization the Secretary of the Treasury had

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[2] 49 Stat. 20, as amended, 31 U.S.C. 757c(a).

provided, among other terms of purchase, that Liberty Bonds could be purchased either in the form of individual ownership or payable to the purchaser during his lifetime and to a named beneficiary on death.

Pursuant to the Act of 1935, the Secretary of the Treasury promulgated regulations which provide not only for the individual and beneficiary forms, but also for the purchase of United States Savings Bonds registered to co-owners. 31 CFR 315.7(a)(2).[3] The regulations state that:

> If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner. * * * [31 CFR 315.61, *supra*, p. 3.]

The Treasury also specified:

> No judicial determination will be recognized which * * * would defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner or beneficiary * * *. [31 CFR 315.20, *supra*, pp. 2–3.]

While we have found no significant legislative history of either the 1917 Act or the 1935 Act bearing upon intended limits to the Secretary's authority to shape the form and legal effect of government bonds, the reenactment and amendment of the 1935 Act in 1941 are significant for two reasons. First, before the reenactment the Treasury had not only issued the regulations creating the co-ownership form for hold-

[3] The regulations in their present form apply to all of the bonds in issue in the present case except to the extent that they might restrict any rights holders of the bonds may have acquired under earlier regulations. 31 CFR 315.0, 315.93.

ing savings bonds, but had also publicly stated that the regulations were designed both to determine to whom the Treasury was obligated to tender payment and also to protect from conflicting state laws the surviving co-owner's right to enjoy the benefits of survivorship. See *infra*, p. 16. Second, the legislative history of the 1941 amendments, although not bearing directly on the validity of the survivorship provisions as interpreted by the Treasury, indicates the considerations which explain and justify the broad delegation of power to create various contract forms with differing benefits to the owners and to protect these benefits from the effects of conflicting state laws.

Representative Doughton, Chairman of the Committee on Ways and Means and sponsor of the Amendments to the 1935 Act, expressed the reasons for enlarging the Treasury's already broad discretion (87 Cong. Rec. 850):

> to issue the exact type of security which might best meet the needs of particular types of investors. The Treasury has before it a difficult and exacting task in securing the funds necessary to pay for national defense and at the same time deal fairly with the investing public and cause the least possible disruption of the investment market.

The same recognized need for broad Treasury control over savings bonds was discussed in the House hearings[4] and in the Senate and House Reports on the bill. H. Rept. No. 20, 77th Cong., 1st Sess., p. 1;

[4] Hearings Before the House Committee on Ways and Means on H.R. 2653, 77th Cong., 1st Sess., p. 6.

S. Rept. No. 41, 77th Cong., 1st Sess., p. 1. The task of floating an immense loan, at the lowest interest rates possible, in a way that would appeal to small and inexpert investors, and without disrupting the national market for investment dollars, was plainly recognized to be a task requiring the power to exercise very broad discretion in defining the terms and benefits of the bonds.

II

THE TREASURY REGULATIONS CREATE FEDERAL SUBSTANTIVE RIGHTS TO ENJOYMENT OF THE SURVIVORSHIP BENEFITS CONFERRED

The Treasury issued co-ownership bonds in order to create a highly marketable security for sale to small investors. These bonds were designed to enable the purchaser or purchasers to combine shared ownership during the time when both owners were alive, with a right of sole beneficial ownership in the survivor. Men and women of modest means would be attracted by simple and certain legal relationships, clearly stated by the United States, and especially by a simple and direct method of automatically transferring ownership upon death without probate proceedings. The attractiveness of the last feature is demonstrated by the common use of joint savings bank accounts, with which the small Treasury bonds would be competing.

The Treasury regulations give these characteristics to bonds held in co-ownership in two separate ways. First, they specify who can obtain payment from the Treasury. Second, they provide that the survivor

will be recognized as the sole and absolute owner, any contrary judicial determination notwithstanding. The history and wording of the regulations, the consistent Treasury interpretation, and the effect given to them by the great majority of state courts leave no doubt that the regulations displace any state laws which either deny the survivor's right to enjoy the benefits of survivorship or impair the convenience, certainty, and simplicity which make the bonds attractive to small investors.

A. HISTORY AND WORDING OF THE REGULATIONS

The relevant portions of the first regulations issued by the Secretary of the Treasury in 1935 provided only that payment of co-ownership bonds would be made to the surviving co-owner or his estate "as though the survivor had been the sole owner" (App., *infra*, p. 37). Since another provision of the regulations stated that payment would also be made in accordance with a judgment or decree of a court of competent jurisdiction, the first provision could easily be read as providing only for a method of routine payment without creating a federal right to enjoy the benefits of survivorship. The ambiguity was plainly cured in the second revision of the regulations, issued in 1938. The Treasury limited the provision for recognition of judicial decrees by adding a stipulation that no judgment would be recognized which "would defeat or impair the rights of survivorship conferred by these regulations upon co-owners and beneficiaries." 31 C.F.R. (1938 Supp.) § 315.15(a), 3 F.R. 3128. The amendment was significant both because of its

explicit reference to rights of survivorship *conferred* by the regulations and because of its plain purpose to deny effect to any state law which impaired the benefit of the survivorship contract with the United States. The amendment explicitly denied the power of a State to affect this federal right even if the impairment was in the form of a state judgment such as would otherwise be recognized by the Treasury Department.

The Treasury also gradually clarified its twofold purpose in relation to the provision of the co-ownership regulations which had initially (in 1935) provided that upon the death of a co-owner the bond would be paid only to the surviving co-owner. The Fourth Revision of the Regulations in April 1941 amended this provision to emphasize that "the surviving coowner will be recognized by the Treasury Department as the sole and absolute owner of the bond." 31 C.F.R. (1941 Supp.) § 315.11(a)(2), 6 F.R. 2191. Even this amendment, which was unnecessary as a clarification of the Treasury's already explicit policies on *method of payment,* was apparently not considered sufficient indication that the regulations created federal contract rights regardless of state laws to the contrary. In the next revision the words "recognized by the Treasury Department" were amended to provide simply that "the surviving coowner will be recognized as the sole and absolute owner of the bond." 31 C.F.R. (1943 Supp.) § 315.32(b), 8 F.R. 8744.

B. ADMINISTRATIVE CONSTRUCTION OF THE REGULATIONS

Not only does the history of the applicable regulations reveal a long continued provision and careful

efforts to make it plain that "the rights of survivorship conferred by these regulations upon a surviving co-owner" include a federal right of sole and absolute ownership in the survivor but the Treasury Department has itself repeatedly interpreted its regulations as preserving for the survivor not merely the formal right to be paid by the Treasury but also the more substantial right to enjoy the benefits of survivorship which may have induced the purchase of the savings bond.

(*1*) In the late 1930's and early 1940's the Treasury Department wrote numerous letters explaining the intent of the regulations to interested persons. For example, in 1941, the Treasury advised the Attorney General of Missouri that "it is the Department's position that bonds registered in [co-ownership] form constitute a contract between the persons in whose names the bonds are registered and the Department, and that upon the death of one of the coowners, the survivor is vested with absolute ownership, regardless of state laws pertaining to joint tenancy or intestate succession" (*infra*, p. 43).

(*2*) When apprised of the pendency of litigation concerning the effect of the Treasury Regulations, the government has regularly participated as *amicus curiae*, presenting the Treasury's views.[8] An early

[8] See, *e.g.*, *In re Di Santo's Estate*, 142 Ohio St. 223, 51 N.E. 2d 639; *Franklin Washington Trust Co.* v. *Beltram*, 133 N.J. Eq. 11, 29 A. 2d 854. In 1948, the General Counsel of the Treasury Department in an address before the Real Property, Probate and Trust Law Section of the American Bar Association called attention to the fact that the Treasury Department was interested in presenting its views in litigations in

example is the brief filed as *amicus curiae* in support of an application for rehearing in *Decker* v. *Fowler*, 199 Wash. 549, 92 P. 2d 254 (1939). The Supreme Court of Washington had ruled that the purchaser of a survivorship bond had failed to satisfy the state requirements of delivery for an *inter vivos* gift. The court directed the survivor to collect the money due on the bonds and turn it over to the administrator of the deceased owner. The bonds were registered in the "beneficiary" form with survivorship rights conferred by regulations identical to those affecting co-ownership bonds. In its brief the government stated unequivocally the interpretation of the Treasury Regulations for which we now contend (pp. 34–36):

> * * * Mrs. Decker has complete ownership of the savings bonds by virtue of the Federal laws and regulations. As pointed out above, the regulations of the Treasury Department provide that upon the death of the registered owner of a savings bond on which a beneficiary is designated payment of the bond will be made to the beneficiary, or, if he so desires, the bond will be reissued in his name—a circumstance which as already indicated necessarily implies complete ownership. If these regulations merely determine the person to whom payment of the bond will be made and do not determine ownership of the bond, and if the surviving beneficiary has to cash the bond and turn the proceeds over to the repre-

which an attempt was being made to defeat the rights of a surviving co-owner or beneficiary. Lynch, *Savings Bonds in Estate Planning*, 87 Trusts & Estates 291 (1948).

sentative of the deceased registered owner's estate, these regulations become mere words and nothing more. The underlying purposes which influence the purchaser of the bond to designate a beneficiary disappear if the beneficiary receives no benefit therefrom. Under such circumstances there would be no reason for the purchaser to designate a beneficiary. It cannot be presumed that the Secretary of the Treasury in issuing these regulations would provide for a useless form of registration and thereby mislead thousands of innocent purchasers who, relying upon the regulations, believed that upon their death the bonds purchased by them would become the property of the persons designated by them as beneficiaries. * * *

(*3*) Since the decision of the Secretary to provide for an absolute right of survivorship—which would not depend upon or be impaired by varying state property rules—was motivated by a desire to make the bonds a more attractive form of investment, the Treasury has publicized its view of survivorship rights in printed circulars which receive wide public distribution. In literally millions of pamphlets distributed in the late 1930's the Secretary advertised throughout the country that "the flexibility and convenience of the co-ownership registration meets varied requirements of the owners of United States savings bonds and may be of particular value in the event of death or incapacity of either owner, as no court procedure is necessary for redemption of savings bonds by a surviving coowner."

Again, because of the great number of inquiries made of the Treasury Department in the early 1940's, the Department drafted a formal memorandum entitled "Statement of Treasury Department on Rights of Surviving Coowners and Beneficiaries of Savings Bonds", dated July 5, 1945 (App., *infra*, pp. 44–51). The *Statement*, and its subsequent revisions* which are primarily designed to bring the table of cases up to date, declare unequivocally that "surviving beneficiaries and coowners of savings bonds are the sole and absolute owners of such securities and that decedents' estates in such cases have no right, title or interest in the bonds", and that "State laws, as for example, the law of wills or of intestate succession * * * have no bearing whatsoever * * *" (App., *infra*, pp. 46, 48). The *Statement* is sent in response to any inquiries made of the Treasury Department and is available at Federal Reserve Banks.

The Treasury's long-standing and consistent interpretation of its own regulations precludes any suggestion that the co-ownership provisions are designed merely to facilitate payment of the bonds with the assurance that the government will not be sued for paying the wrong person. It cannot be said that this established administrative interpretation is "plainly erroneous or inconsistent with the regulation". Accordingly, the administrative interpretation that a real and absolute federal contract right of survivorship was intended to be created, notwithstanding conflicting state property law, is in itself dispositive as to the meaning of the regulations. *Bowles* v. *Seminole Rock*

*The fifth and current revision, dated October 1, 1958, is reprinted *infra*, pp. 51–61.

Co., 325 U.S. 410, 413–414; *Wright* v. *Paine*, 289 F. 2d 766, 768 (C.A. D.C.); *Daly* v. *United States*, 286 F. 2d 146, 149 (C.A. 7).

C. THE EFFECT GIVEN THE TREASURY REGULATIONS BY THE MAJORITY OF STATE COURTS

Recognizing that the attractiveness of co-ownership savings bonds to small investors depends upon the effectiveness of the Treasury's assurance that survivorship benefits are created by compliance with the federal regulations, the great majority of state courts have held that the right of a purchaser of a co-ownership bond to contract for the creation of survivorship interests is a matter of federal law overriding conflicting state laws. State requirements for a testamentary or *inter vivos* gift, state rules of descent and distribution, and state modification or abolition of joint tenancies have all been disregarded when recognizing them would impair or defeat the Treasury's promise of survivorship benefits. See Brief of Petitioner at pp. 22–25.

Only in the case of fraud, deceit, duress, mistake, or other seriously unfair circumstances such that the purchaser of the savings bond is not equitably entitled to dispose of the survivorship rights created by the federal contract have the majority of state courts recognized an exception to the survivor's right to enjoy the benefits of a co-ownership bond. For example, a wife who withdrew all of her husband's earnings from a joint bank account and invested them in co-ownership bonds of which her husband was not a co-owner did not create survivorship interests valid against

the husband who was equitably entitled to dispose of one half of the bank account. *Henderson's Admr.* v. *Bewley*, 264 S.W. 2d 680. Again, where the executor of a deceased co-owner had the bonds reissued without the survivor's knowledge in a co-ownership form with himself as co-owner the court properly ordered reissue in the name of the survivor alone. *In re Haas' Estate*, 10 N.J. Super. 581, 77 A. 2d 523. And where a husband attempted to defraud his wife of her rights under joint and mutual wills by converting his assets into co-ownership bonds, the court declared a resulting trust in the proceeds in favor of the wife. *Anderson* v. *Benson*, 117 F. Supp. 765 (D.C. Neb.). See also *Kats* v. *Driscoll*, 86 Cal. App. 2d 313, 194 P. 2d 822.

But even this line of exceptions is defined by federal law, and a state court's power to impair the benefits of a co-ownership bond because of such factors as fraud, duress, or mistake is confined within the limits cognizable consistently with the Treasury Regulations. A state court could not, for example, give effect to its statute of wills in conflict with the Treasury provisions for creation of survivorship benefits by merely asserting that failure of compliance with the state rule constitutes a fraud on the estate of the deceased co-owner. Compare *Lee* v. *Anderson*, 70 Ariz. 208, 218 P. 2d 732, with *Kats* v. *Driscoll*, 86 Cal. App. 2d 313, 194 P. 2d 822. As in many other cases, state property law or state law imposing fiduciary obligations provides the context for a determination of federal consequences, but whether survivorship bene-

fits are being improperly impaired remains a federal question.

The distinction drawn by the holdings of these cases is suggested by the following statement from the *Anderson* case, *supra* (117 F. Supp. at 780):

> If counsel's construction of the regulations were accepted without qualification United States Savings Bonds would become the impenetrable sanctuary of ill-gotten gains and an excellent instrumentality for the perpetration of deliberate fraud. That Congress did not intend, in exercising its constitutional power to borrow money, to effect such a result is too clear to require discussion.

On the one hand, a state has no power to deny the owner of property or a person with authority to act on behalf of the owner the right to invest the property in co-ownership bonds and enjoy their benefits; nor can it impose procedural requirements inconsistent with the Treasury Regulations for the realization of these benefits. On the other hand, one obtains no special right to enjoy the benefits of an unauthorized use of another's property simply by investing it in co-ownership bonds. State laws protecting a person's right to the use, enjoyment, and control of his property form an implicit exception to the Treasury Regulations even if they impair the survivorship rights which the wrongdoer illegally attempted to create, for federal bonds are not to be made a sanctuary for a wrongdoer's gains. The rightful owner can pursue his property even after it has been converted into a co-ownership bond.

III

THE TEXAS SUPREME COURT HAS ERRONEOUSLY DEPRIVED THE SURVIVING CO-OWNER OF THE BENEFITS CONFERRED BY THE TREASURY

The Texas Supreme Court has held in this case that in Texas a husband and wife cannot authorize the creation of a survivorship interest in co-ownership savings bonds by simply entering into a contract with the United States in compliance with federal regulations and by paying over funds which they alone own. It is plain that the decision below was not—and in its procedural context could not be—predicated upon a finding of fraud or inequitable conduct. Nor does it involve an owner's right to pursue the proceeds of property of which he has been wrongfully deprived.

The proceedings before the Texas Supreme Court in substance involved cross motions for summary judgment. For the purpose of passing upon respondent's motion, which it granted, the Texas Supreme Court was required by state rules to treat all unresolved factual questions as if determined in favor of petitioner. Respondent did not allege any form of actual fraud upon the part of petitioner. Moreover, even respondent's traversed allegation that the bonds were purchased without the knowledge or consent of petitioner's wife had to be considered untrue for the purpose of summary judgment by the state court. Indeed, it is entirely clear that the court below considered it unnecessary to resolve any factual dispute about the wife's consent or knowledge or any legal question as to the bearing of an absence of consent

upon fraud or the petitioner's authority to invest the community funds. For the court's decision rests exclusively upon its earlier opinion in *Hilley* v. *Hilley*, 342 S.W. 2d 565, where it held that, regardless of a complete absence of fraud and despite defeat of the plain intent of the parties, a husband and wife can not use community property to create a joint tenancy in either government savings bonds or corporate stocks.'

The holding of the court below denying the right of the co-owners of community property to use it to create a survivorship interest in federal co-ownership bonds is in direct conflict with the Treasury Regulations and represents a sharp departure from the rule followed by the great majority of states that the rights of survivorship in United States savings bonds cannot be defeated or impaired by contrary state law except to recognize the claims of one who has been deprived of his right to the use and enjoyment of the property invested in co-ownership bonds. The manner in which Treasury bonds may be acquired with assent of the owners of the consideration exchanged, and also

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' The court reasoned that any attempt to purchase a survivorship interest with community property inevitably ran afoul of the statutory definitions of separate and community property (342 S.W. 2d at 569):

"* * * Under the terms of their contract if the same is effective, each [husband and wife] relinquished at least some of the legal incidents of community ownership and received in lieu thereof the right to become absolute owner in the event he or she survived the other contracting party. * * * There is no gift then but an attempted transfer of a survivorship right or interest from each spouse to the other for a valuable consideration. Since the consideration paid by each is derived from the community estate, the right or interest which each expected to acquire necessarily remains part of that estate."

the kinds of interest which may be created in Treasury bonds, are governed exclusively by the federal law and regulations. No distinction between common law and community property law could justify the court below in disregarding this established principle. In the words of the earlier Texas decision sustaining the effectiveness of the Treasury Regulations against a similar challenge under state law, "There is no sanctity of the community property law above that of other types of law." *Hicks* v. *Smith*, 159 Tex. 280, 318 S.W. 2d 422, 440.

Wissner v. *Wissner*, 338 U.S. 655, involved a strikingly similar situation. In that case a serviceman's widow claimed to be entitled to one-half the proceeds of National Service Life Insurance on the life of her husband. The serviceman had designated his mother as the beneficiary of the policy. Under California community property law pertaining to ordinary insurance policies the widow was entitled to one-half the proceeds because the insurance premiums had been paid with community property and she had not consented to the use of the property for that purpose. The California court, on the basis of state law, entered judgment in favor of the widow for one-half the amount of the policy. This Court reversed, because the fact that "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary" was dispositive. 338 U.S. at 658. The Court noted that "[w]hether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the

soldier's choice and frustrates the deliberate purpose of Congress." 338 U.S. 659.

Nor is it significant that the Texas court suggested that by following the state procedures for partition of community property into separate property, and then following the state procedures for creation of a joint tenancy out of separate property, a survivorship interest in federal bonds could be obtained. The Treasury regulations protect not only the substance of survivorship benefits but also the certainty and convenience of the simple Treasury procedures for obtaining them—procedures upon which many thousands of purchasers have relied. Texas has no greater power to condition the enjoyment of federally-created survivorship benefits upon compliance with the "partition" requirement of "a written instrument subscribed and acknowledged by both spouses in the manner now required by law for the conveyance of realty" (Vernon's Texas Civ. St. Ann., Art. 4624a) than has a common law state to condition federal survivorship benefits upon compliance with its statute of wills, or its requirement of delivery for making an *inter vivos* gift, or its requirement of a particular form of writing to create a joint tenancy. And each of the latter has been regularly held inapplicable to co-ownership savings bonds. See, *e.g.*, *Lee* v. *Anderson*, 70 Ariz. 208, 218 P. 2d 732.

As the case now stands, no Texas court has found, or heard evidence from which it could find that petitioner was acting in fraud of his wife's rights or even without her consent and authority in purchasing

and continuing to hold for more than thirteen years of her life the co-ownership bonds now in issue. The decision of the Texas Supreme Court granting summary judgment for the respondent must therefore be reversed.

* * * * *

While the decision of the Supreme Court of Texas granting summary judgment to respondent must be reversed, it would, in the government's view, be inappropriate for the Court at this time to rule upon petitioner's motion for summary judgment. There are a number of questions of fact and, possibly, of State law which should be resolved before passing upon any remaining federal questions.

1. The extent of petitioner's consensual authority to purchase the bonds has not been established. Although respondent alleges that petitioner acted without the knowledge or consent of his wife, the evidence may contradict the allegation. Consensual authority may be created not only by express and specific assent but also by a course of conduct implying willingness to have the agent undertake a particular transaction or class of transactions. The evidence may show that petitioner's wife had approved similar transactions in the past or otherwise gave him reason to believe that she was willing to have him purchase the bonds. She may have subsequently learned of the purchase and conducted herself in such a way as to ratify petitioner's action. If the evidence develops along any of these lines, petitioner's claim to the survivorship benefits would rest squarely upon the normal federal right of the

owners or one authorized by the owners to invest their property in Treasury co-ownership bonds.

2. Even if petitioner had no consensual authority to purchase Treasury bonds, he may establish his right to make the purchase in the exercise of a husband's normal managerial powers and duties with respect to community property. Although the Texas court held that the husband's authority does not extend to the use of community funds to create a joint tenancy with his wife without the wife's consent to a formal partition, the nature of this limitation has not been defined exactly enough to present in sharp focus additional questions which the Texas rule might raise concerning the relationship between the State and federal law. If the Texas law, fairly construed, were aimed solely at preventing a husband from abusing a fiduciary position by overreaching his wife under circumstances which might be denominated fraudulent under general legal principles,[9] the federal law might permit Texas to impose a constructive trust upon the bonds and their proceeds under the principles outlined above (p. 21, *supra*). Such a situation might arise if a husband were to invest community property heavily in co-ownership bonds at a time when he knew his life expectancy was many times greater than his wife's. Other, closer cases can readily be imagined. But one cannot rule out, at this stage, the possibility that the Texas rule, as applied to co-ownership bonds and other joint tenancies, is essentially a law pertaining to the

[9] *Strong* v. *Repide*, 213 U.S. 419; *Magruder* v. *Drury*, 235 U.S. 106; cf. *Murphy* v. *Cartwright*, 202 F. 2d 71 (C.A. 5); *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808 (D.C. Del.).

devolution of property upon death, *i.e.*, that its function is to prevent husbands from acquiring rights of survivorship in the wife's share of community property. If so, the rule plainly conflicts with the federal law governing Treasury bonds and is invalid *pro tanto*. If the Texas limitation on the husband's authority cannot fairly be limited to cases of fraud or breach of trust akin to fraud but is nevertheless designed either to protect the wife's interest in the property while she is alive or to insure the husband's proper attention to the management thereof, then more difficult questions concerning the relationship of the State and federal law arise which ought not to be determined without full evidence upon the facts and more precise exposition of local community property law.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court should be reversed.

Respectfully submitted.

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JANUARY 1962.

APPENDIX

Regulations Governing United States Savings Bonds

Treasury Department,
Office of the Secretary,
Washington, February 25, 1935.

1935
Department Circular No. 530

Public Debt Service

To Owners of United States Savings Bonds, and Others Concerned:

The following regulations governing United States Savings Bonds are published for the information and guidance of all concerned:

I. REGISTRATION

1. United States Savings Bonds will be issued only in registered form. Except as otherwise specifically provided in these regulations, the Treasury Department reserves the right to treat as conclusive the ownership and interest in the bond as stated in the registration.

2. The following forms of registration are authorized:

(*a*) In the name of any individual, including minors.

(*b*) In the names of two (*but not more than two*) natural persons in the alternative, as, for example, "John Jones OR Mary Jones." The addresses of both persons should be inscribed on

the savings bonds. No other form of registration in two names is authorized except, as provided in subparagraphs (*c*) and (*d*) hereof.

(*c*) In the name of one individual and a single designated beneficiary in case of death, as for example, "John Smith, payable on death to Mary Smith", in which case the address of the registered owner and the address of the beneficiary should be inscribed on the face of the savings bond.

(*d*) In the name of one or more guardians, executors, administrators, trustees, or other fiduciaries, whose names shall be given, followed by a description as complete as possible of the capacity in which and the persons for whom they hold the savings bonds. Registration in a form indicating that the persons whose names appear on the bonds do not hold full legal title to the savings bonds, as, for example, "John Jones, under Article 10, of the will of Henry Smith", will not be permitted.

(*e*) In the name of any corporation, unincorporated association, partnership, or joint-stock company. The name of the owner should be followed by the word or words "corporation", "unincorporated association", "partnership", or "joint-stock company", as the case may be. No designation may be made in the registration of an officer or agent to receive payment in behalf of the corporation, unincorporated association, partnership, or joint-stock company.

II. BONDS NOT TRANSFERABLE

United States Savings Bonds are not transferable; and are payable only to the owner named thereon, ex-

cept in case of the death or disability of the owner or as a result of judicial proceedings, and then only to the extent specifically provided in Sections XIII, VIII, and XIV hereof.

III. LIMITATION ON HOLDINGS

Under the provisions of Section 22 of the Second Liberty Bond Act, approved September 24, 1917, as amended, it shall not be lawful for any one person at any one time to hold savings bonds issued during any one calendar year in an aggregate amount exceeding $10,000 (maturity value). In determining whether the $10,000 limitation on the holdings of any one person has been exceeded, the full maturity value of savings bonds issued in any one calendar year held for the benefit of such person in the name of a fiduciary or fiduciaries, or held by such person with any other person (but not of bonds of which such person is merely the designated beneficiary in case of the death of the owner), shall be added to the full maturity value of such bonds held by such person in his or her own name, and the sum must not exceed $10,000 (maturity value). If any person who owns savings bonds should become the owner of additional savings bonds as the result of the death of any other person, and the total amount then owned by him is in excess of the lawful limit, he should immediately surrender the excess for payment at the redemption value for the period in which the excess was acquired.

IV. LOST, STOLEN, OR DESTROYED BONDS

1. Under the provisions of the Revised Statutes, duplicates may be issued or payment made upon proof of the loss, theft, or destruction of savings bonds. Application for relief in such cases will be governed

by the regulations found in Department Circular No. 300. Full information as to the requirements, as well as appropriate forms, may be secured from the Treasury Department, Division of Loans and Currency, Washington, D.C.

2. It is important that immediate notice of such loss, theft, or destruction be given to the Treasury Department.

V. SAFEKEEPING FACILITIES

1. Any savings bond will be held in safekeeping by the Secretary of the Treasury if the purchaser so desires, and in this connection the Secretary will utilize the facilities of the Federal Reserve banks as fiscal agents of the United States. The purchaser may arrange for such safekeeping at the time he purchases his bond or subsequently. If the owner desires his bond held in safekeeping, he can obtain from the postmaster an appropriate envelope, and an application blank which he should fill out, address to the appropriate Federal Reserve bank, sign and enclose with the bond in the envelope, which should be addressed to the appropriate Federal Reserve bank. The postmaster will then register the envelope, at the owner's expense, and the registry receipt will serve as the owner's temporary receipt.

2. When received at the Federal Reserve bank, the bond will be placed in safekeeping and a receipt from the bank will be mailed to the owner at the address given in the application. The owner can subsequently regain possession of his bonds upon application to the Federal Reserve bank, and upon such identification as is required by such bank.

3. Postmasters generally will assist owners in arranging for safekeeping, but will not act as a safekeeping agent.

VI. GENERAL PAYMENT PROVISIONS

1. Savings bonds will be payable at or after maturity at their full value, or, at the option of the owner, prior to maturity (but not within 60 days after the issue date) at the appropriate redemption value as shown on the face of each bond. Payment, in each case, will be made following presentation and surrender of the bond, at the Treasury Department, Division of Loans and Currency, Washington, D.C., or at any Federal Reserve bank, with the request for payment appearing on the back thereof properly executed in accordance with the succeeding paragraphs. Such presentation will be at the expense and risk of the owner and, for his protection, the bond, or bonds, should be presented in person or forwarded by registered mail.

2. The request for payment must be signed in ink or indelible pencil by the person in whose name the bond is inscribed, or by the person entitled to receive payment under the provisions hereof. The request must be signed in the presence of, and be certified by, one of the following officers:

(*a*) Any United States postmaster, acting postmaster, or official in charge of a post office authorized to sell savings bonds: provided that in post offices of the first class the assistant postmaster, the postal cashier, the superintendent of money orders, or the superintendent or clerk in charge of a classified station or branch may certify to the request for payment; and provided further that at any post office of the second class, the assistant postmaster, or the clerk in charge if there is no assistant postmaster, may certify to the request for payment. If an official other than a postmaster, acting postmaster, or an official in charge of an office certifies to a request for payment, he should certify in the name of the post-

master, acting postmaster, or official in charge, followed by his own signature and official title, e.g., "John Doe, postmaster, by Richard Roe, Superintendent of Money Orders". The certification of any post-office official must be authenticated by a legible imprint of the dating stamp of his post office;

(*b*) Any executive officer of an incorporated bank or trust company, whose signature must be authenticated by the impression of the corporate seal of the bank or trust company;

(*c*) Any officer authorized generally to witness assignments of United States registered bonds (See Pars. 33–35 Department Circular 300).

3. No person authorized to certify requests for payment may certify a request signed by himself, either in his own right or in any representative capacity.

4. Certifying officers should require positive identification of the person executing the request for payment as the person whose name appears on the face of the bond, or the person entitled to request payment under the provisions of these regulations, and will be held fully responsible therefor.

VII. MINORS

1. If a savings bond is registered in the name of a minor and the Treasury Department has notice that a guardian of the estate of such minor has been appointed by a court of competent jurisdiction, payment will be made only to such guardian. The request for payment appearing on the back of the bond should be signed: "A. B., minor, by C. D., guardian" and must be supported by a certificate from the proper court, or by a certified copy of the order appointing the guardian, showing his appointment and qualification. The certificate, or certified copy, must be under

the seal of the court and should be dated not more than one year prior to the presentation of the bond.

2. If the Treasury Department has no notice of the appointment of a guardian of the estate of a minor owner of a savings bond, payment will be made direct to such minor owner, provided such minor is, at the time payment is requested, of sufficient competency and understanding to sign his name to the request and to comprehend the nature thereof. In general, the fact that the request for payment has been signed by the minor and duly certified in accordance with Section VI hereof will be accepted as sufficient proof of such competency and understanding. If the Treasury is properly advised in the request for payment that such minor owner is not of sufficient competency and understanding to execute the request for payment, payment will be made to either parent of the minor with whom he resides, or in the event that such minor resides with neither parent, then to the person with whom he does reside. In executing the request for payment the parent or other person shall sign the minor's name as well as his own name, and state his relationship to the minor, and there shall be inserted above the space for signature in the request for payment a statement to the effect that the owner is a minor, that he is not of sufficient competency and understanding to execute the request for payment, and that the person signing the request is the person with whom the minor resides. An appropriate form is as follows:

"I am the _____ (*state relationship*) of A. B. and the person with whom he resides. He is not of sufficient competency and understanding to sign this request.

C. D._____
on behalf of A. B."

VIII. DISABILITY OF OWNERS

1. If the owner of a savings bond has been legally declared to be incompetent to manage his affairs and the Treasury Department has notice that a conservator or other legally constituted representative of his estate has been appointed by a court of competent jurisdiction, payment will be made only to such conservator or other legal representative. The request for payment should be signed: "A. B. incompetent, by C. D., conservator" (guardian or committee as the case may be), and must be supported by a certificate from the proper court or a certified copy of the order of the court appointing such conservator or other legal representative showing his appointment and qualification. The certificate, or certified copy, should be under the seal of the court and dated not more than one year prior to the date of the presentation of the savings bond for payment.

2. In cases where the owner of a savings bond has been judicially declared incompetent or insane and no guardian or other legal representative of his estate has been appointed, and the entire gross value of his personal estate, both real and personal, does not exceed $500, payment will be made to a member of his family standing in the position of voluntary guardian upon presentation of proof satisfactory to the Secretary of the Treasury that the proceeds of the bonds are required, and are to be used, for the purchase of necessaries for the incompetent or for his wife or minor children or other persons dependent upon him for support.

IX. COOWNERS

A savings bond registered in the names of two persons in the alternative, as for example, "John Jones OR Mary Jones", will be payable to either person

named thereon without requiring the signature of the other person, but not to the representative of a deceased coowner except as hereinafter provided, and upon payment to either person the other shall cease to have any interest in the bond. Should one of the owners die and then the survivor himself die before payment of the savings bond, the provisions of Section XIII hereof, governing payment or reissue of savings bonds held by a deceased owner, shall govern the payment or reissue of the bond as though the survivor had been the sole owner.

X. BENEFICIARIES

1. A savings bond registered in the form "A. B. payable on death to C. D." will be payable, until the Treasury Department has received notice of the death of the registered owner, as if the beneficiary were not named on the bond. Upon proof of death of the registered owner, the bond will be payable to, or reissued in the name of, the beneficiary named on the bond, at his option (but only if such beneficiary did not predecease the original owner), as if he had been the registered owner.

2. If the beneficiary should predecease the registered owner, the savings bond will be payable to the registered owner as though such beneficial registration had not been made. Registration naming beneficiaries at the death of the registered owner cannot be changed so as to add, eliminate, or substitute beneficiaries.

3. Should the beneficiary die after the death of the registered owner, but before payment or reissue of the savings bond, the provisions of Section XIII hereof governing payment or reissue of savings bonds held by a deceased owner, shall govern the payment or reissue of the savings bond as though the beneficiary had been the registered owner.

XI. FIDUCIARIES

1. A savings bond registered in the name of a fiduciary will be paid to such fiduciary without proof of his authority upon presentation of the bond with the request for payment duly signed by him and certified in accordance with Section VI hereof. The request for payment should be signed by the fiduciary in exactly the same manner as his name and designation as fiduciary appear on the face of the savings bond.

2. In the event of the death or disqualification of a fiduciary in whose name a savings bond is registered, such savings bond will be paid to, or, if desired, reissued in the name of, his successor upon satisfactory proof of the appointment and qualification of such successor. If there is no successor, the savings bond may be paid to, or, if desired, reissued in the name of the person or persons beneficially entitled thereto upon satisfactory proof of their beneficial ownership.

XII. CORPORATIONS, ASSOCIATIONS, PARTNERSHIPS, ETC.

1. A savings bond registered in the name of a corporation, unincorporated association, or joint-stock company will be paid upon a request for payment signed by a duly authorized officer of such organization. The signature to the request should be in the form, "The ---------- Company, by JOHN JONES, President". The fact that the request for payment is signed and duly certified in accordance with Section V hereof may be accepted as sufficient proof of the officer's authority.

2. A savings bond registered in the name of a partnership will be paid upon a request for payment signed by any general partner. The signature to the request should be in the form "Smith and Jones, a partnership, by JOHN JONES, a general partner". The fact that the request for payment is signed and

duly certified in accordance with Section VI hereof may be accepted as sufficient proof that the person signing the request is a general partner.

XIII. DECEASED OWNERS

1. *With administration.*—If the owner of a savings bond dies leaving a will which is duly admitted to probate and on which letters testamentary are issued, or dies intestate and the estate is administered in a court of competent jurisdiction, payment will be made to the duly appointed representative of the estate. The request for payment should be signed in the form, "A. B., executor (administrator) of the estate of C. D., deceased", and must be supported by a certificate under the seal of the court appointing such representative, dated not more than six months prior to the presentation of the savings bond for payment, showing the appointment and qualification of such representative and stating that the appointment is still in force; or, in the absence of such a certificate, by a duly certified copy of the representative's letter of appointment, the certification of which must be dated not more than six months prior to the presentation of the bond for payment, and must state that the appointment is still in force. A savings bond will be reissued in the name of an heir or legatee of the deceased owner upon the request of the representative accompanied by his certificate to the effect that the person in whose name reissue is requested is entitled to the savings bond as such legatee or heir. If the representative is himself the heir or legatee entitled to the savings bond and desires reissue in his own name, a special order of the court authorizing such reissue must be submitted.

2. *Without administration.*—If the owner of a savings bond dies and no legal representative of his

estate is to be appointed and it is established to the satisfaction of the Secretary of the Treasury, either that the gross value of the personal estate does not exceed $500, or that administration of the estate is not required in the State of the decedent's domicile, the savings bond will be paid to, or reissued in the name of, one (but not more than one) of the persons entitled to the bonds under the laws of the State of the decedent's domicile without administration. The request for payment should be signed in the form, "A. B., C. D., E. F., heirs and persons entitled to the estate of X. X., deceased," and should be accompanied by an agreement signed by all persons entitled, specifying the person to whom payment is to be made or in whose name the bond is to be reissued. Proof will be required that the debts of the decedent and of his estate have been paid or provided for, and that the person to whom payment is requested or in whose name reissue is requested, is entitled to the bonds; such proof will include affidavits of all persons entitled to any share in the estate setting forth the facts in detail and agreeing to the payment or reissue in question, supported by affidavits of two disinterested persons having personal knowledge of the decedent and his family and by a death certificate or other proof of the death of the owner. (Use Form L. & C. 285, copies of which may be procured from the Treasury Department or any Federal Reserve bank.) If the gross value of the personal estate exceeds $500 the Secretary of the Treasury may further require an affidavit or a certificate from a practicing attorney or judicial officer of the State of the decedent's domicile showing that administration of the estate is not required in such State and referring specifically to the statutes or the decisions of the courts of such State under which exemption from adminis-

tration is claimed, or showing that it is a general and well recognized practice in that State to settle such estates without administration.

3. No payment or reissue without administration will be permitted in a case where any of the persons entitled are minors or under disability, except to them or in their names or upon compliance with the provisions of Sections VII and VIII hereof governing the payment of savings bonds in the names of such persons.

XIV. CREDITORS' RIGHTS

Payment of a savings bond will be made in accordance with a judgment or decree of a court of competent jurisdiction, or proceedings pursuant to such judgment or decree, except in cases where the action is instituted for the purpose of giving effect to an attempted transfer by the owner contrary to Section II hereof. In appropriate cases the Treasury Department will require proof that the court acting had jurisdiction over the parties and subject matter, and proceeded in due course of its jurisdiction, and that the judgment or decree is final and conclusive, that it has fully and effectually transferred the title of the owner, and that it is not open to attack in any jurisdiction whatever. For this purpose duly authenticated copies of the complaint, order of service, return of service, answer, or other pleading, and the final judgment or order of the court must be furnished, together with a certificate, under seal, from the clerk of the court showing that the time for appeal has elapsed without an appeal having been taken, or that an appeal has been taken and determined by the court of last resort (in which case certified copy of the rescript or mandate of such court must be furnished) and that no further appeal is possible.

XV. DENOMINATIONAL EXCHANGE OR REISSUE

No denominational exchanges of savings bonds will be permitted, and except as expressly provided by this circular no reissue of savings bonds will be made, whether in the same name or in another name.

XVI. FURTHER PROVISIONS

These regulations are prescribed by the Secretary of the Treasury as governing United States Savings Bonds issued under the authority of the Second Liberty Bond Act, approved September 24, 1917, as amended, and the provisions of Treasury Department Circular No. 300 have no application to such savings bonds except as hereinbefore specifically provided.

The Secretary of the Treasury may at any time, or from time to time, prescribe supplemental or amendatory rules and regulations governing United States Savings Bonds.

HENRY MORGENTHAU, JR.,
Secretary of the Treasury.

JUNE 9, 1941.

ROY MCKITTRICK, Esq.,
Attorney General
Jefferson City, Missouri

Dear Sir:

My attention has been called to your letter of May 12, 1941, addressed to the Secretary of the Treasury, with respect to United States Savings Bonds registered in the name of "Dr. B. Rush Mason or Mary Belle Mason" as coowners.

The rights of registered owners or coowners named in United States Savings Bonds are governed by the regulations issued from time to time by the Depart-

ment. These regulations have the force and effect of law since they have been promulgated pursuant to the authority contained in Section 22 of the Second Liberty Bond Act of September 24, 1917, as added by the Act of February 4, 1935, 49 Stat. 21 (U.S.C. title 31, sec. 757c). The latter act has recently been amended by the Public Debt Act of 1941 (Public No. 7, 77th Congress). The regulations now in force are contained in Department Circular No. 530, Fourth Revision, a copy of which is enclosed. It is there provided that upon the death of a coowner without having surrendered the bond for payment, the surviving coowner "will be recognized by the Treasury Department as the sole and absolute owner of the bond". Section 315.11(a)(2). It is the Department's position that bonds registered in this form constitute a contract between the persons in whose names the bonds are registered and the Department, and that upon the death of one of the coowners, the survivor is vested with absolute ownership, regardless of state laws pertaining to joint tenancy or intestate succession. Registration in the form you suggest would therefore be unnecessary for the purpose of securing the rights of the survivor. Moreover, only one form of registration, establishing coownership is authorized by the regulations. (See Sec. 315.2(c)(1)(ii))

For a case upholding the rights of survivorship conferred upon coowners of United States Savings Bonds, your attention is invited to *In re Stanley's Estate,* (Colo. 1933) So. P. (2d) 332. In that case it was claimed that certain United States Savings Bonds which had been purchased by the testatrix, Mrs. Stanley, should constitute a part of her estate and be distributed accordingly. The Supreme Court of Colorado, however, overruled that contention and

awarded the bonds to the surviving coowner in accordance with their tenor and the regulations of the Department.

Very truly yours,

/s/ JOSEPH J. O'CONNELL, Jr.,
Acting Assistant General Counsel.

Enclosures
JM:mw 6/4/41

STATEMENT OF TREASURY DEPARTMENT

On Rights of Surviving Coowners and Beneficiaries of Savings Bonds[1]

The Treasury regulations provide that surviving coowners and beneficiaries are entitled to sole and absolute ownership of savings bonds and that judicial proceedings which would defeat or impair those rights will not be recognized. These regulations, promulgated in 1935 pursuant to Section 22(a) of the Second Liberty Bond Act, have been in effect, with minor changes, ever since. Insofar as the rights of coowners and beneficiaries are concerned, they were based on very similar regulations governing the issuance of War Savings Certificates during the first world war, which had been tested in the courts and uniformly upheld.[2] Those certificates were issued under the authority of 31 U.S.C., Section 757, 40 Stat. 291, which provides in part "Such war savings certificates shall be in such form or forms and subject to such terms

[1] The term "savings bonds" as used herein signifies all United States Savings Bonds, of whatever series, including those referred to as Defense Savings Bonds and as War Savings Bonds.

[2] *Warren* v. *United States* (1929), 68 Ct. Cls. 634 (cert. denied 50 Sup. Ct. 346, 281 U.S. 739); *United States* v. *Janowitz* (1921), 257 U.S. 42, and *United States* v. *Sacks* (1921), 257 U.S. 37.

and conditions, and may have such provisions for payment thereof before maturity, as the Secretary of the Treasury may prescribe."[3]

The Department's position on the savings bond question is that the rights of surviving coowners and beneficiaries to sole and absolute ownership, established by the regulations, which are incorporated by reference in the text of the bonds, are exclusively matters of Federal law and contract (*Ruddy* v. *Rossi* (1918), 248 U.S. 104), arising in the exercise of the borrowing power granted to the Government by the Constitution (*McCulloch* v. *Maryland* (1819), 4 Wheat. 316, 411–15, 421).

Under the Constitution the Government has the power to borrow money on the credit of the United States (Art. I, Sec. 8, Cl. 2) and to make all laws which shall be necessary and proper for carrying that power into effect (Ibid. Cl. 18). Section 22(a) of the Second Liberty Bond Act, pursuant to which savings bonds are issued, provides in part that savings bonds shall be issued "in such manner and subject to such terms and conditions * * * including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe."[4] No contention has ever been made that the regulations promulgated by the Secretary under that section are in excess of the authority therein conferred on him, and, in view of the broad statutory terms used, no such argument could be sustained.

Therefore the regulations governing savings bonds are a valid exercise of the Federal borrowing power, have the force and effect of Federal law *United States*

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[3] Compare with the savings bond statute quoted in part in the third paragraph hereof.

[4] Section 22(a) was amended by the Public Debt Act of 1941 (55 Stat. 7, U.S.C. 1946 Ed., title 31, sec. 757c).

v. *Birdsall* (1914) 233 U.S. 223; *United States* v. *Jannowitz* (1921), 257 U.S. 42), and by virtue of Article VI, Cl. 2, of the Constitution are "the supreme law of the land" by which the "judges in every State shall be bound * * *, anything in the Constitution or laws of any State to the contrary notwithstanding." It follows that State laws, as for example, the law of wills or of intestate succession, or laws governing given forms of tenancy or the common law related to delivery in the case of gifts, have no bearing whatsoever on the problem and that judicial decisions based thereon are in derogation of the supreme law of the land.

Almost without exception, courts throughout the country have been sustaining as matters of Federal law and contract the rights of surviving beneficiaries and coowners established by the savings bond regulations. Decisions in the following States have held that estates of deceased owners or coowners have no right, title or interest in the bonds when there is a surviving beneficiary or coowner: Arkansas, California, Colorado, Florida, Illinois, Iowa, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, and Wisconsin.* The decisions were handed down by the highest State court in the following States: Arkansas, Colorado, Florida, Iowa, Maine, Nevada, North Carolina, Ohio, and Texas.

The cases of *Decker* v. *Fowler* (Wash., 1939), 92 P. (2d) 254, and *Deyo* v. *Adams* (N.Y., 1942), 36 N.Y.S. (2d) 734, which refused to uphold the rights of surviving beneficiaries, have been severely criticized by a

* The appendix to this statement contains a complete table of cases.

number of courts[6] and by other noted authorities, and have been repudiated by the legislatures of their respective States in statutes adopting the language of the Federal regulations and confirming the rights of surviving coowners and beneficiaries.[7] The erroneous reasoning of the Decker case is sharply pointed out in 131 A.L.R. 967, in 14 Wash. Law Rev. 312 (1939), suggesting that it is as unconstitutional as it is erroneous, and in 27 Minn. Law Rev. 401 (1943), characterizing it—and incidentally the Deyo opinion which followed it—as "poor law." In brief, both cases have been thoroughly discredited.

Moreover, *Deyo* v. *Adams* had little, if any, value as a precedent to begin with, for the opinion was handed down not on the merits, but on a motion to dismiss for insufficiency of complaint and, over objection that the interlocutory decision was the law of the case, the court nevertheless granted the Gov-

[6] *Deyo* v. *Adams* has been criticized even by courts in the same State. For example, see Mr. Surrogate Foley's opinion in *In re Deyo's Estate*, which is cited in the appendix to this statement.

[7] Wash. Rev. Stat. (Remington's Supp. 1943), Secs. 11548–60, 61, and 40 McKinney's Consol. Laws of New York, Ann. (Supp. 1943), Sec. 24. California and Illinois have enacted similar legislation. See Sec. 704, Civil Code, added by the laws of 1943, and Ch. 76, Sec. 2, as amended, Smith-Hurd Illinois Annotated Statutes, respectively. In view of its opinion that the rights of surviving coowners and beneficiaries of savings bonds rest firmly on the constitutional power of the Federal Government to borrow money on the credit of the United States and to enact all laws necessary to the effective exercise of that power, the Treasury Department has never requested or urged State legislation on the subject although undoubtedly statutes such as those which have been enacted in California, Illinois, New York, and Washington are helpful in preventing litigation in those States.

ernment's motion for leave to participate by way of a Suggestion of the Interest of the United States. The Government filed its Suggestion of the Interest of the United States in order to get a decision on the merits but, for reasons not within its control, there were numerous delays. On pages 382 and 383 of his opinion in *In re Deyo's Estate,* Mr. Surrogate Foley commented on this, stating that the facts set forth "clearly show that the responsibility for the unjustifiable delay in the disposition of the question of ownership of the bonds rests wholly with the executrix." Finally the action was discontinued by stipulation of the parties and the bonds were paid to the beneficiary, Mrs. Adams.

It is quite clear then that the opposing decisions carry no weight as judicial authorities and that the overwhelming majority of cases which have arisen in the courts have sustained the Government's position that surviving beneficiaries and coowners of savings bonds are the sole and absolute owners of such securities and that decedents' estates in such cases have no right, title or interest in the bonds.

[July 5, 1945]

APPENDIX

Below is a table of cases[1] in which the courts have held that decedents' estates have no right, title, or interest in savings bonds when there is a surviving beneficiary or coowner.[1] One asterisk before the name of a case signifies that the bonds involved therein were in coownership form. Two asterisks before the name of a case mean that some of the bonds involved were in the coownership form and

[1] See also *Warren* v. *United States*, cited in footnote 1, page 1 of the Statement. The *Warren* case involved Treasury War Savings Certificates inscribed "A, payable on death to B".

others in the beneficiary form of registration. The other cases deal entirely with rights of surviving beneficiaries.

It should be kept in mind that cases involving rights of surviving beneficiaries may be cited in support of the rights of surviving coowners of savings bonds, and vice versa, because the right of survivorship in each case is identical and the courts have uniformly based their decisions on considerations of contract. Unreported cases are cited in the table because most of them have been decided in probate courts and, since they deal with decedents' estates, their opinion that the bonds do not constitute part of the estate when there is a surviving beneficiary or coowner should receive great weight.

Table of Cases

Myers vs. *Hardin* (Ark. S. Ct. 1945) 186 S.W. (2d) 925

**Conrad* vs. *Conrad* (Calif. 1944) 152 P. (2d) 221

***Klenck* vs. *Crocker First National Bank* (No. 294,-300, Superior Ct., San Francisco Co., Calif., 1942)

**In re Stanley's Estate* (Colo. S. Ct. 1938) 80 P. (2d) 379

Matilda Mason vs. *H. G. Briley* (Fla. S. Ct. 1945) 21 So. (2d) 595

**In re Estate of August P. Ohlin* (No. 43–C–270, Circuit Ct., Cook Co., Ill., 1943)

In re Estate of Orson S. Killick (Circuit Ct., Cook Co., Ill., Jan. 12, 1944)

**In re Estate of Clara Courtney* (Probate No. 4916, Dist. Ct. for Fayette Co., Ia., 1944)

In re Estate of Emma C. Logan (No. 19,710, Dist. Ct. for Scott Co., Ia., 1944)

**In re Murray's Estate* (Iowa S. Ct. 1945) 20 N.W. (2d) 49

**Succession of Tanner* (La. Ct. of Appeals 1946) 24 So. (2d) 642[1]

Harvey vs. *Rackliffe* (Me. S. Ct. 1945) 41 A. (2d) 455

**Josephine Holden Murdock* vs. *Ina M. Spencer* (Norfolk Probate No. 112,529, Mass. June 1947)

Charlton vs. *Charlton* (No. 40,777, Circuit Ct. for Kent Co., Mich., 1938)

Alda Groce Cox vs. *Federal Reserve Bank of St. Louis and Monzel G. Evans, Admx.* (Civil No. 2519, Dist. Ct. of U.S., E.D., Mo., June 1944)

Kate Farrell vs. *H. J. Coleman* (Dist. Ct. for Yellowstone Co., 13th Dist., Mont., April 27, 1942)

**In re Estate of Anna Donohoe* (Probate No. 3323, Holt County, Nebr., 1947)

**Stephens* vs. *First National Bank of Nevada, August A. Glanzmann, Admr.* (Nevada S. Ct. 1948)

Franklin Washington Trust Co. vs. *Beltram* (N.J. 1943) 29 A. (2d) 854

Reynolds vs. *Danko* (N.J. 1944) 36 A. (2d) 420

**In re Estate of Andrew S. Levy* (Orphans Ct., Camden Co., N.J., March 10, 1944)

In re Deyo's Estate (N.Y. 1943) 42 N.Y.S. (2d) 379

**In re Willoughby's Will* (N.Y. 1943) 45 N.Y.S. (2d) 177

In re Hager's Estate (N.Y. 1943) 45 N.Y.S. (2d) 468

**Commercial National Bank, Exr.* vs. *Frederickson* (No. Car. S. Ct. June 6, 1945) 34 S.E. (2d) 402

Ervin vs. *Conn* (No. Car. S. Ct. June 6, 1945) 34 S.E. (2d) 402; 14 U.S. Law Week 2011

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[1] Cf. *Succession of Geagan (La. S. Ct. 1947) 33 So. (2d) 118.

Lauferweiler vs. *Richmond* (Ohio 1942) 22 Ohio Op. 265

In re Estate of Louis Di Santo (Ohio S. Ct. 1943) 51 N.E. (2d) 639

****Estate of Agnes Mellott Dockhorn*** (No. 1577-D Co. Ct. Garvin Co., Okla., 1945)

United States vs. *Dauphin Deposit Trust Co.* (M. D., Pa. 1943) 50 F. Supp. 73

Mitchell vs. *Edds* (Tex. S. Ct. 1945) 184 S.W. (2d) 823

In re Will of Celia Breslauer (No. 233-559, Milwaukee Co., Wis., Nov. 1, 1944)

STATEMENT OF THE TREASURY DEPARTMENT ON THE RIGHTS OF SURVIVING COOWNERS AND BENEFICIARIES OF SAVINGS BONDS[1]

The Treasury regulations provide that surviving coowners and beneficiaries are entitled to sole and absolute ownership of savings bonds and that judicial proceedings which would defeat or impair those rights will not be recognized. These regulations, promulgated in 1935 pursuant to Section 22(a) of the Second Liberty Bond Act, have been in effect, with minor changes, ever since. In so far as the rights of coowners and beneficiaries are concerned, they were based on very similar regulations governing the issuance of War Savings Certificates during the first world war, which had been tested in the courts and uniformly upheld.[2] Those certificates were issued

[1] The term "savings bonds" as used herein means all United States Savings Bonds of whatever series, including those referred to as Defense Savings Bonds and as War Savings Bonds.

[2] *Warren* v. *United States* (1929) 68 Ct. Cl. 634, cert. denied 281 U.S. 739, 50 S. Ct. 346; *United States* v. *Janowitz* (1921) 257 U.S. 42, and *United States* v. *Sacks* (1921) 257 U.S. 37.

under the authority of 31 U.S.C., Section 757, 40 Stat. 291, which provides, in part: "Such war savings certificates shall be in such form or forms and subject to such terms and conditions, and may have such provisions for payment thereof before maturity, as the Secretary of the Treasury may prescribe."[3]

The Department's position on the savings bond question is that the rights of surviving coowners and beneficiaries to sole and absolute ownership, established by the regulations, which are incorporated by reference in the text of the bonds, are exclusively matters of Federal law and contract (*Ruddy* v. *Rossi* (1918) 248 U.S. 104), arising in the exercise of the borrowing power granted to the Government by the Constitution (*McCulloch* v. *Maryland* (1819) 4 Wheat. 316, 411–15, 421).

Under the Constitution the Government has the power to borrow money on the credit of the United States (Art. I, Sec. 8, Cl. 2) and to make all laws which shall be necessary and proper for carrying that power into effect (*Ibid.* Cl. 18). Section 22(a) of the Second Liberty Bond Act (55 Stat. 7, U.S.C. 1952 Ed. Title 31, Sec. 757c), pursuant to which savings bonds are issued, provides in part that savings bonds shall be issued "in such manner and subject to such terms and conditions * * * including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe." No contention has ever been made that the regulations promulgated by the Secretary with respect to rights of surviving beneficiaries and coowners of savings bonds are in excess of the authority therein conferred on him, and, in view of the

[3] Compare with the savings bond statute quoted in part in the third paragraph hereof.

broad terms of the statute, no such argument could be sustained.

Therefore, the regulations governing savings bonds are a valid exercise of the Federal borrowing power, have the force and effect of Federal law (*United States* v. *Birdsall* (1914) 233 U.S. 223; *United States* v. *Janowitz* (1921) 257 U.S. 42), and by virtue of Article VI, Cl. 2, of the Constitution are "the supreme law of the land" by which the "judges in every state shall be bound * * *, anything in the Constitution or laws of any state to the contrary notwithstanding." It follows that state laws, as for example, the law of wills or of intestate succession, or laws governing given forms of tenancy, or the common law related to delivery in the case of gifts, have no bearing whatsoever on the problem and that judicial decisions based thereon are in derogation of the supreme law of the land.

Almost without exception, courts throughout the country have sustained as matters of Federal law and contract the rights of surviving beneficiaries and coowners established by the savings bond regulations. Decisions in the following states have held that estates of deceased owners or coowners have no right, title or interest in the bonds when there is a surviving beneficiary or coowner: Ala., Ariz., Ark., Calif., Colo., Fla., Ga., Ida., Ill., Ind., Iowa, Kans., La., Me., Mass., Mich., Miss., Mo., Mont., Neb., Nev., N.J., N.Y., N.C., N. Dak., Ohio, Okla., Pa., S.C., S. Dak., Tex., and Wisc.[4] The decisions were handed down by the highest State Court in the following states: Ala., Ariz., Ark., Colo., Fla., Ga., Iowa, Kans., Me., Mass., Miss., Mo., Nev., N.C., N. Dak., Ohio, Okla., Tex. and Wisc.

[4] The appendix to this statement contains a table of cases.

The cases of *Decker* v. *Fowler* (Wash. 1939) 92 P. 2d 254, and *Deyo* v. *Adams* (N.Y. 1942) 36 N.Y.S. 2d 734, in which the rights of the surviving beneficiaries were not upheld have been severely criticized by a number of courts [5] and by other noted authorities, and have been repudiated by the legislatures of their respective states in statutes adopting the language of the Federal regulations and confirming the rights of surviving coowners and beneficiaries.[6] The erroneous reasoning of *Decker* v. *Fowler* is sharply pointed out in 131 A.L.R. 967 in 14 Wash. Law Rev. 312 (1939), suggesting that it is as unconstitutional as it is erroneous, and in 27 Minn. Law Rev. 401 (1943), characterizing it—and incidentally *Deyo* v. *Adams* which had followed it—as "poor law". In brief, both cases have been thoroughly discredited.

It is quite clear then that the opposing decisions carry no weight as judicial authorities, and that the overwhelming majority of cases which have arisen in the courts have sustained the Government's position that surviving beneficiaries and coowners of savings bonds are the sole and absolute owners of such securities and that decedents' estates in such cases have no right, title to or interest in the bonds.

WASHINGTON, October 1, 1958, Fifth Revision.

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[5] *Deyo* v. *Adams* has been criticized by courts in the same state. For example, see Mr. Surrogate Foley's opinion in *In re Deyo's Estate*, which is cited in the appendix to this statement. Finally, the case was discontinued by stipulation of the parties and the bonds were paid to the surviving beneficiary.

[6] Wash. Rev. Stat. (Remington's Supp. 1943), Secs. 11548–60, 61, and 40 McKinney's Consol. Laws of New York, Ann. (Supp. 1943), Sec. 24. California, Illinois and Oregon have enacted similar legislation. See Sec. 704, Civil Code of Calif., added by the Laws of 1943; Ch. 76, Sec. 2, as amended, Smith-Hurd Ill. Annot. Stats.; and Sec. 114.270, Ore. Rev. Stats., respectively. Also see Title 51–104 Burns Ind. Stats. Anno.

NOTE: In view of its opinion that the rights of surviving coowners and beneficiaries of savings bonds rest firmly on the constitutional power of the Federal Government to borrow money on the credit of the United States and to enact all laws necessary to the effective exercise of that power, the Treasury Department has never requested or urged state legislation on the subject although undoubtedly statutes such as those which have been enacted in California, Illinois, New York, Oregon, and Washington are helpful in reducing litigation in those states.

APPENDIX

Below is a table of cases[1] in which the courts have held that decedents' estates have no right, title to or interest in savings bonds when there is a surviving beneficiary or coowner. One asterisk before the name of a case means that the bonds involved therein were in coownership form. Two asterisks before the name of a case mean that some of the bonds involved were in the coownership form and others in the beneficiary form of registration. The other cases deal entirely with rights of surviving beneficiaries.

It should be kept in mind that cases involving rights of surviving beneficiaries may be cited in support of the rights of surviving coowners of savings bonds, and vice versa, because the right of survivorship in each case is identical and the courts have uniformly based their decisions on considerations of contract. Unreported cases are cited in the table because most of them have been decided in probate courts and, since they deal with decedents' estates, their opinion that the bonds do not constitute part of the estate when there is a surviving beneficiary or coowner is entitled to receive considerable weight.

[1] See also *Warren* v. *U.S.* (p. 1, footnote 1) involving Treasury War Savings Certificates inscribed "A, payable on death to B".

Rulings (in some of the cases cited in the table) which may be of special interest are:

(1) *Creditors' Rights.—Reynolds* v. *Danko, In re Estate of Andrew S. Levy* (both N.J.) and *Matter of Laundree* (question of fraudulent conveyance under Article 10 of N.Y. Debtor and Creditor Law) held that savings bonds in the beneficiary and coownership forms were not within reach of creditors of the deceased owner, notwithstanding the insolvency of the estate.

(2) *Agreement Transmuted Separate Property into Community Property.*—A purchased bonds in B's name payable on death to C. Upon B's death, D, his widow, claimed an interest in the bonds on the basis of an agreement between her and B transmuting all of their separate property into community property. *In re Raffael's Estate* (Calif.) held that the Federal regulations were controlling and that B had no power unilaterally by the transmutation agreement with D to divest C of his right of survivorship in the bonds.

(3) *Property Settlement Agreements.*—Savings bonds purchased during the marriage of the parties (some of them in the husband's name, payable on death to the wife, others in their names in coownership) were held, in *Franklin* v. *Pope* (Ga.) to be the property of the former wife at the owner's death, notwithstanding a property settlement agreement entered into between the parties in connection with divorce proceedings. The court rightly observed that rights in savings bonds are matters of contract not dependent upon the marriage and that an agreement based essentially on the following stipulation merely extinguished former wife's claims which had arisen by virtue of the marriage: "This said settlement of alimony is hereby accepted by the wife as a full release

and quittance of any and all liability, present and future, insofar as any alimony or property adjustment between them is concerned and the said wife specifically waives and renounces any right of dower or years' support in the estate of the husband."

(4) *Murder and Suicide.*—In *Smith* v. *Greenburg* (Colo.) the court held that there was no provision in the savings bonds regulations under which a surviving coowner's rights could in any way be affected by his murder of the other coowner. Upon the survivor's suicide, title passed through his estate rather than the estate of the other coowner.

(5) *Attempt to Cut Off Right of Survivorship by a Will.*—In *Davis* v. *Beach* (Calif.) the court held that a will attempting to dispose of savings bonds to a person other than the designated beneficiary was invalid as against the surviving beneficiary since the latter's rights rest on considerations of Federal law and contract and there was no provision in the contract under which the owner could, at his option, change the beneficiary without the beneficiary's consent.

(6) *Common Disaster Statute Cannot Cut Off Right of Second Deceased Coowner and His Estate.*—*In re Gilger's Estate* (Ohio) held that the right of a surviving coowner of savings bonds is a contract right controlled by the pertinent regulations governing savings bonds, not by state statutes concerning descent and distribution. The statutory provision involved had the effect in a common disaster case of depriving the second decedent of taking any part of the first decedent's estate when the second decedent's death takes place within 30 days after the death of the first decedent.

(7) *Surviving Beneficiary Not Accountable for Value of the Bonds as an Advancement.*—*Jones* v.

Callahan (N.C.) held that the beneficiary became sole owner under the terms of the bond contract and did not have to account for the value of the bonds as an advancement as they "do not fall within the distinction of an advancement, to wit, an irrevocable gift in praesenti of money or of property, real or personal, to a child by the parent, to enable the donee to anticipate his inheritance or succession of a gift."

Table of Cases

**Ex parte Little* (Ala. S. Ct. 1953) 67 S. 2d 818
***Chambless* v. *Black, et al.* (Ala. S. Ct. 1948) 35 S. 2d 348
***Lee* v. *Anderson* (Ariz. S. Ct. 1950) 218 P. 2d 732
Myers v. *Hardin* (Ark. S. Ct. 1945) 186 S.W. 2d 925
**Umberger* v. *Westmoreland* (Ark. S. Ct. 1951) 238 S.W. 2d 495
Davis v. *Beach* (Calif. 1946) 168 P. 2d 452[1]
**Conrad* v. *Conrad* (Calif. 1944) 152 P. 2d 221
***Klenck* v. *Crocker First Nat. Bank* (No. 294, 300, Superior Ct., San Francisco Co., Calif., 1942)
In re Raphael's Estate (Calif. 1953) 252 P. 2d 979
Smith v. *Greenburg* (Colo. S. Ct. 1950) 218 P. 2d 514
**In re Stanley's Estate* (Colo. S. Ct. 1938) 80 P. 2d 332
Mason v. *Briley* (Fla. S. Ct. 1945) 21 S. 2d 595
**Knight* v. *Wingate* (Ga. S. Ct. 1949) 52 S.E. 2d 604
***Franklin* v. *Pope* (Ga. Ct. of App. 1950) 59 S.E. 2d 726
Frank F. Kibler v. *Hattie E. Laughlin, et al.* (Dist. Ct., 7th Dist., Canyon Co., Ida., Apr. 11, 1956)

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[1] The report contains an incorrect statutory citation. It refers to 31 U.S.C.A. Section 747 ff whereas the proper citation is 31 U.S.C.A. Section 757c.

**In re Estate of August P. Ohlin* (No. 43–C–2720, Circuit Ct., Cook Co., Ill., 1943)

In re Estate of Orson S. Killick (Circuit Ct., Cook Co., Ill., Jan. 12, 1944)

**Stein, Adm'r. Estate of Chas. J. Stein* v. *Anna Ida Stein* (No. 2157, Circuit Ct., Posey Co., Ind., Oct. 2, 1948)

**In re Estate of Clara Courtney* (Probate No. 4916, Dist. Ct. for Fayette Co., Ia., 1944)

In re Estate of Emma C. Logan (No. 19,710, Dist. Ct. for Scott Co., Ia., 1944)

**In re Murray's Estate* (Iowa S. Ct. 1945) 20 N.W. 2d 49

***Hill* v. *Havens* (Iowa S. Ct. 1951) 48 N.W. 2d 870

**In re Clemmons' Estate* (Iowa S. Ct. 1951) 49 N.W. 2d 883

**Lemon* v. *Foulston* (Kans. S. Ct. 1950) 219 P. 2d 388

**Succession of Tanner* (La. Ct. of App. 1946) 24 S. 2d 642[*]

Harvey v. *Rackliffe* (Me. S. Ct. 1945) 41 A. 2d 455

Reynolds v. *Reynolds* (S.J. Ct. Mass. 1949) 90 N.E. 2d 338

**Josephine Holden Murdock* v. *Ina M. Spencer* (Norfolk Probate No. 112529, Mass., June 1947)

Charlton v. *Charlton* (No. 40,777, Circuit Ct., Kent Co., Mich., 1938)

**Myers* v. *Laird, et al.* (Miss. S. Ct. 1957) 93 S. 2d 828

Alda Groce Cox v. *Federal Reserve Bank of St. Louis and Monzel G. Evans, Admx.* (Civil No. 2519, Dist. Ct. of U.S., E.D., Mo., June 1944)

**Coleman, Exec'r.* v. *Abbie Ella Shankland, et al.* (Missouri 1948, No. 22256–D, Circuit Ct., City of St. Louis)

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[*] Cf. *Succession of Geagan (La. S. Ct. 1947) 33 S. 2d 118.

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U.S. GOVERNMENT PRINTING OFFICE: 1962

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No. 205

In the

Supreme Court of the United States

OCTOBER TERM, 1961

J. W. FREE,

Petitioner,

v.

JAMES F. BLAND,

Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The statements in this connection at page 2 of Brief for Petitioner are correct.

JURISDICTION

It is submitted that this Court does not properly have jurisdiction herein, and that the writ of certiorari should be dismissed as improvidently granted, since no Federal question is really involved and, regardless of the construc-

tion of the Treasury Regulations, they have not been violated or disregarded by the judgment of the District Court as reinstated by the Supreme Court of Texas.

QUESTION PRESENTED

Whether the wife's estate may have a claim for reimbursement or reconvention against the surviving husband under state community property law, where the husband has used community funds to purchase savings bonds in the names of himself "or" his wife, so that upon her death the bonds will be recognized as his property by the Treasury Department.

STATEMENT

J. W. Free purchased U. S. savings bonds with community funds without his wife's knowledge and consent, in the names of himself "or" his wife; the wife died and her son and legatee J. F. Bland duly qualified as her executor (R. 1).

Petitioner Free sought a declaratory judgment that he was sole owner of the bonds. Respondent filed a cross-action asserting that he owned a one-half interest in the bonds or, in the alternative, that he was entitled to a money judgment for reimbursement or reconvention to the wife's half of the community because of the purchase of the bonds with community funds without her knowledge or consent (R. 22). Free filed a motion for summary judgment (R. 5), but the only affidavit attached thereto was that of his attorney (R. 7) which does not assert that there was any knowledge or consent on the part of Mrs. Free, nor is there any pleading of such knowledge or consent.

In ruling upon the motion, the District Court did not sustain Respondent's claim of the ownership of an interest in the bonds, but rendered judgment for Petitioner "adjudging him to be the owner of the U. S. Government Bonds sued for herein," and specifically ordering, adjudging and decreeing "that the plaintiff, J. W. Free, do have and recover of and from the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, judgment for the title to and possession of the U. S. Government Bonds" (R. 28). It was declared that, "The Court, having considered the pleadings on file and the affidavits, finds that they show an absence of any genuine issue as to any material fact," and the Court went on to render a money judgment for Respondent for a sum equal to half the value of the bonds in repayment to the wife's half of the community estate because of the use of community funds for the purchase of the bonds. The Court of Civil Appeals affirmed the judgment, declaring Petitioner to be the owner of the bonds and awarding title and possession to him, but reversed the money judgment to Respondent (R. 37). The Supreme Court of Texas in turn reinstated and affirmed all of the judgment of the trial court, the awarding of title and possession of the bonds to Petitioner and of the money judgment to Respondent (R. 54).

Petitioner errs in stating that his claim to ownership of the bonds was rejected and Respondent's claim to one-half of the bonds upheld; in fact, Petitioner's claim to ownership of the bonds was sustained and Respondent's claim to ownership of one-half of the bonds was rejected, but Respondent

as representative of the deceased wife's estate was allowed a money judgment by way of reimbursement for her portion of the community funds which were used to purchase the bonds, without her knowledge or consent, in accordance with his alternative plea of constructive fraud. Again contrary to the statement in Petitioner's Brief, it does not follow from the action of the Supreme Court of Texas and was not held by that Court that savings bonds "purchased by husband and wife with community property and registered in their names as co-owners, would on the death of one be treated in Texas not as property of the other, as provided by the Treasury Regulations, but as community property belonging half to the surviving spouse and half to the estate of the deceased spouse." It was expressly adjudged that the bonds belonged in their entirety to the surviving spouse who alone was vested with title and possession thereof, but reimbursement to the wife's estate for her share of the funds going into the purchase was allowed.

SUMMARY OF ARGUMENT

I.

The Treasury Regulations by their own terms do not purport to be determinative of the property rights of ownership but rather of the Department's recognition of ownership and payment of proceeds.

II.

Even if the Regulations be interpretated as determinative of ownership rather than the Department's recognition and treatment of ownership, still the Texas courts have deter-

mined ownership of the bonds in full accord with the Regulations, giving judgment for the title to and possession of the bonds to Petitioner, and the allowance of a right of reimbursement of the community for the use of community funds does not conflict therewith; the Regulations clearly do not purport to control accounting between estates of husband and wife with respect to marital rights of reimbursement or adjustment for use of community funds.

III.

The judgment here does not conflict with the cases cited by Petitioner, and many of those very cases recognize that a constructive or resulting trust, an equitable lien, or a right of reimbursement is something apart from and not in conflict with recognition of absolute title in a surviving co-owner.

IV.

Respondent in the District Court in the alternative to his plea of ownership of a one-half interest in the bonds pleaded constructive fraud entitling the wife's half of the community to reimbursement for the purchase of the bonds with community funds and registration in co-owner form without her knowledge or consent, and the law of Texas recognizes such constructive fraud in the absence of actual wrongful intent, the requirements for such constructive fraud properly being a matter of state law and not a Federal question.

ARGUMENT

This is a singularly inappropriate case for certiorari as to precedence between Treasury Regulations and state law

since the judgment here does not refuse to give effect to those regulations but is consistent with them even if they are construed as determining ownership, and since the Supreme Court of Texas wrote no full-dress opinion in the present case at all, but merely referred to its opinion in *Hilley v. Hilley, 342 S. W. 2d 565*, which itself involves only corporate stock and not U. S. Bonds. Whatever the interpretation of the Regulations, the judgment here is not in conflict, and even if they control ownership, they do not concern matters of accounting or reimbursement between the estates of husband and wife for use of community funds. What is sufficient to constitute constructive fraud in Texas as a basis for such adjustment or reimbursement is surely a proper matter for determination by the state courts and not by this Honorable Court.

I.

The wording of the Regulations is not in terms of establishing ownership, but rather of establishing the Department's treatment and recognition of ownership. Thus, the statement in Sec. 315.5 that the form of registration "will be *considered as* conclusive of such ownership and interest," being in a Treasury Regulation, plainly means that it will be so considered by the Treasury Department. It does not state "will be conclusive," but pointedly uses the words "considered as." Sec. 315.20 does not state that no judicial determination can defeat or impair the rights of survivorship but merely that no such determination "will be recognized," clearly meaning recognized by the Department. Sec. 315.61 does not state that "the survivor *will be* the sole and

absolute owner," but rather "the survivor *will be recognized as* the sole and absolute owner," obviously referring to recognition by the Department for payment or reissue, particularly since it is stated immediately following, "Thereafter payment or reissue will be made as though the bond were registered in the name of the survivor alone," with further requirements given as to proof to be presented.

The history detailed in the Amicus Curiae Brief bears this out, and while the wording has variously been that "the surviving co-owner will be recognized by the Treasury Department as the sole and absolute owner of the bond," and "the surviving co-owner will be recognized as the sole and absolute owner of the bond," it has never been "the surviving co-owner will be the sole and absolute owner of the bond."

While the administrative interpretation may be relevant in case of ambiguity, it cannot override the clear meaning of the words used. *73 C.J.S., Public Administrative Bodies and Procedures, Sec. 106*, after recognizing the role of administrative construction in case of ambiguity, goes on to say:

> "On the other hand, where the meaning of the words used in an administrative rule or regulation is not in doubt, or where the language used is not technical, the court need not necessarily look to the administrative construction thereof; nor is such construction conclusive on the court."

Words such as "recognized" and "considered" are not technical and clearly mean just what they say. The C.J.S. quotation is supported by such authority as the opinion of this Court in *Brown & Sons Lumber Co. v. Louisville & Nashville RR., 299 U. S. 393.*

In *State v. Gettinger, 105 N. E. 2d 161 (S. Ct. of Ind.)*, it is stated:

> "• • • but rights created or benefits conferred by an administrative rule should not be extended by interpretation beyond the plain terms of the rule itself. 42 Am. Jur., Public Administrative Law, Sec. 101, p. 431. To do so would be to create rules by interpretation, thus defeating the legislative requirement that rules may be adopted only by compliance with required formality. • • • • Moreover, where as here, the meaning of the rule is not doubtful, or the language technical, we need not look to the administrative construction of it."

See also *Department of Insurance v. Church Members Relief Ass'n., 26 N. E. 2d 51 (Ind.); Bowles v. Dairymens League Co-op. Ass'n., 61 F. S. 358 (D. C.); etc.*

II. and III.

If the Regulations establish ownership and not merely the Treasury's recognition thereof, still the judgment here is not in conflict since it awards ownership, title, and possession to the survivor. Certainly the Regulations do not purport to determine rights of reimbursement between the estates of spouses for the use of community funds, nor to make any rules of law about accounting or adjustment for funds used in purchase of the bonds, as opposed to the right to the bonds themselves and their proceeds. Indeed, the statutory authority would not extend to such an attempt, since this is not part of the "terms and conditions" subject to which the bonds are issued, which the Secretary is authorized to prescribe.

Even the cases cited by Petitioner and the Amicus Curiae recognize the distinction between title to bonds and rights arising with reference to the funds used for their purchase. We will not here repeat the argument in this connection contained in our Brief in Opposition to Certiorari, pp. 6-11, but adopt it here by reference, and mention merely additional authorities to such effect.

Thus, in *Bell v. Killian, 92 So. 2d 769 (Ala.)*, where funds left to a widow for her support only were invested by her in U. S. bonds in co-ownership form, on her death it was held that the court could not impose a trust directly on the bonds in favor of the remaindermen, but it could decree a constructive trust as to the proceeds. In *Succesion of Geagan, 33 So. 2d 118 (La.)*, the named beneficiary was recognized as the owner of the bonds, but with a claim recognized in the purchaser's widow for one-half the value in reimbursement of her community interest in the funds used for the purchase. In *Succession of Land, 31 So. 2d 609 (La.)*, the court recognized that bonds payable to Mrs. Land or her daughter were governed by the Regulations, that on the death of one co-owner the survivor would be recognized as the sole and absolute owner, but held that this did not foreclose all rights other than ownership:

> "The district court gave full force and effect to the laws and regulations governing United States War Savings Bonds, and recognized Mrs. Triplett as the owner of these bonds, but reserved the right of John R. Land, Jr. to claim his full legitime and to claim collations because of these gifts. We find no error in this ruling."

Katz v. Driscoll, 194 P. 2d 822 (Cal.), cited by both Petitioner and Amicus Curiae, declares:

> "While the cases above cited hold that as between the Government and the survivor or beneficiary of the bonds and all other claimants the courts will recognize only the survivor or beneficiary, there is no case that holds that where the bonds are the result of fraud, the person defrauded cannot pursue the proceeds of such bonds in the hands of one who is a party to the fraud."

Where a daughter during the mother's life assigned all her interest in U. S. savings bonds registered in their names as co-owners, *In Re Hendricksen, 56 N. W. 2d 711 (Neb.)*, held that the executor of the mother's estate was entitled to the proceeds of the bonds which the daughter as surviving co-owner had cashed, and that no Federal law or Treasury Regulation was affected by such decision.

Henderson's Adm'r v. Bewley, 264 S. W. 2d 680 (Ky.), declares a constructive trust in favor of a husband in bonds purchased by the wife with joint funds without his knowledge or consent and registered in her name and that of others as co-owners, although recognizing that under the contract with the Treasury only the surviving payees could receive payment.

Petitioner deprecates the case of *Decker v. Fowler, 92 P. 2d 254 (Wash., 1939)*, on the ground that it was "promptly repudiated by state legislation," but overlooks the fact that even after such legislation, *In Re Allen's Estate, 343 P. 2d 867 (S. Ct. of Wash., 1959)*, continued to hold that the regulations making registration conclusive of ownership did not govern all rights concerning the funds going into the pur-

chase, and quoted *Anderson v. Benson, 117 F. S. 765 (D.C., Neb.)*, as holding that the owner of property could not be deprived of it by the wrongful purchase of Government bonds, so that rights of reimbursement could exist aside from the question of ownership of the bonds.

The question with respect to reimbursement for use of community funds is not the same as that of testamentary disposition or descent and distribution or the like, which do go to ownership.

We do want to mention again the case of *In Re Schubert, 63 N. Y. S. 2d 27*, discussed in our Brief in Opposition, because of its very close analogy to the present situation. There partnership funds were used to purchase U. S. savings bonds in the names of the partners as co-owners. On the death of one, it was held that title and the right to possession of the bonds was in the survivor, but that upon proof that partnership funds went into the purchase, the value of the bonds could be taken into consideration in an action for an accounting. The marital community is a form of partnership between the husband and wife ("The relationship of husband and wife toward the community property is that of a partnership." *Simpson v. Brotherton, 62 Tex. 170*), and the judgment here merely takes into consideration the use of community funds in the purchase of the bonds in an accounting between the respective community interests of the spouses. This is by no means in contravention of the Treasury Regulations.

The marketability of U. S. bonds is not affected by the judgment here. The "simple and direct method of automatically transferring ownership upon death" still exists, and its attractiveness to purchasing husbands is not diminished. However, it is not the object of the Treasury nor the usual inducement to the purchaser that the bonds be used as a means of depriving the wife's estate of any share of funds in which she has an interest, without her knowledge and consent, or to provide a means of fraud, actual or constructive. It is not such a motive that promotes the sale of U. S. bonds, and if such a motive should exist, certainly it should not be the policy of the Government of the United States to foster it.

As the Amicus Curiae Brief speaks of the competitiveness of Treasury bonds with joint savings bank accounts, we should note that statutes providing that the survivor shall have power to act in all matters respecting such accounts and to receive payments are held to be for the bank's protection and not determinative of the possible rights of others against a survivor who has collected such funds. *Reed v. Reed, 283 S. W. 2d 311 (Tex. Civ. App.); Pruett v. First National Bank, 175 S. W. 2d 658 (Tex. Civ. App.); Jones v. Neu, 150 N. E. 2d 858 (Ohio); Seymour v. Seymour, 85 So. 2d 726 (Fla.); Woodward v. Auyong, 34 Hawaii 597; Powell v. Powell, 263 S. W. 2d 708 (Ark.);* etc. Thus the Treasury is not being put at any competitive disadvantage.

It has also been held that the Postal Savings Law provision, *39 U. S. C. A. 754*, that deposits made by a married woman should be "in her own name and free from interference by her husand," permits payment to the married woman

depositor but that the Postal Savings Department is not concerned with rights of recovery thereafter against depositors who have received payment. *Zorich v. Zorich, 88 N. E. 2d 694 (Ind.); Reed v. Reed, 283 S. W. 2d 311 (Tex. Civ. App.);* etc.

IV.

Respondent in his cross-action expressly pleaded for reimbursement on the ground of constructive fraud, and on this ground only, in the alternative to his allegations of ownership of a one-half interest in the bonds, and urged the contention in his Application for Writ of Error (R. 42). Petitioner points out that the husband has general authority to manage and dispose of community property in Texas. However, although he may give or convey it to third persons, he may not give or convey it to himself or his estate; moreover, the limitation as to fraud includes constructive fraud as well as instances of actual wrongful intent. As stated in DeFuniak, *Principles of Community Property, Sec. 119,* "There is not always a necessity of proving an actual intent to defraud or an improper motive on the part of the husband."

Petitioner repeatedly makes an analogy to insurance situations, and it should be noted that in this field a distinction is recognized between right and title to the proceeds and possible rights of reimbursement, and between the husband's gift or transfer of community funds to others and such action in favor of himself or his own estate.

Thus, in *Warthan v. Haynes, 288 S. W. 2d 481*, cited by Petitioner, as well as in *Volunteer State Life Ins. Co. v. Hardin, 197 S. W. 2d 105*, the Supreme Court of Texas, while holding that ownership of the policy proceeds was in accordance with the designation of beneficiary, took pains to point out that it was not passing upon the possible rights of the parties to reimbursement for cash surrender values. The *Warthan* opinion, after holding the proceeds to belong to the separate estate of the husband, also goes on to say, "Nothing in this opinion, however, is to be construed as holding that in case of actual *or constructive fraud* upon the wife, beneficiary designations by the husband will preclude her or her estate from obtaining relief." *Martin v. Moran, 32 S. W. 904*, still frequently cited, declares that while the husband might properly expend community funds for policies payable to third persons, he is not entitled to make them payable to his estate, saying, "The husband can give his interest in the community property to another, but he cannot give his wife's interest to himself." Of this case the *Warthan* opinion states, "If, as it seems to be, the basis of that decision was, that for the husband, under certain circumstances, to pay premiums out of community and to make the proceeds payable to his estate, amounts to fraud upon the wife, it would not necessarily run counter to that of *Volunteer State Life*."

Kemp v. Metropolitan Life Ins. Co., 205 F. 2d 857, considering Texas law as to policies with premiums paid by community funds, quotes Speer, *Law of Marital Rights in Texas, 3rd Ed., p. 203:*

> "His conveyance or disposition of the community may be a legal fraud upon her rights though not intended

> to wrong her. There may be an utter absence of intended fraud, yet the transaction be voidable."

In *U. S. v. Rompel, 326 U. S. 367*, this Court pointed out that it was conceded as to the Texas law, and properly so, "that malicious and fraudulent intent need not be established in order that the wife shall have the remedies referred to."

Speer further states in the same section (Sec. 150) as the above quotation:

> "A cause could arise, however, where the husband might so employ the community property in the acquision of other property, as an insurance policy, so as to make the new acquisition his separate property, or the property of still another, and yet he and his estate become liable to the wife for the funds of the community used."

Petitioner also overlooks that he failed to raise properly an issue of fact that the wife had knowledge or gave consent, as the only affidavit attached to his motion, that of his attorney, did not assert such to be true, and there is no pleading of such knowledge or consent, although as plaintiff he had the burden of pleading and proof. It should further be remembered that the judgment of the district court expressly declares (R. 28) that "The Court, having considered the pleadings on file and the affidavits, finds that they show an absence of any genuine issue as to any material fact."

What is necessary for constructive fraud under the Texas law and what state of the record creates a fact issue are properly matters for determination by the state courts and surely do not present a Federal question.

CONCLUSION

The Writ of Certiorari should be dismissed as improvidently granted, or in the alternative, the judgment of the Supreme Court of Texas recognizing the ownership of U. S. savings bonds in the surviving co-owner in accordance with the Treasury Regulations, but allowing a money judgment in adjustment between the community estates of husband and wife for the use of community funds, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the day of , 1962, I served true and correct copies of the foregoing Brief for Respondent upon Petitioner by depositing the same in the United States Post Office with first class postage, prepaid and addressed to Gerhard A. Gesell and W. Graham Claytor, Jr., 701 Union Trust Building, Washington 5, D. C., and Edwin M. Fulton and Hollie G. McClain, Box 500, Gilmer, Texas, attorneys for Petitioner.

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